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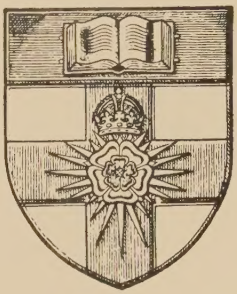

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Under the Superintendence and Control of the
INCORPORATED COUNCIL OF LAW REPORTING FOR ENGLAND AND WALES.

Supreme Court of Judicature.

CASES DETERMINED IN THE

CHANCERY DIVISION

AND IN

LUNACY,

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL.

EDITOR—G. W. HEMMING, Q.C.

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CASES

DETERMINED BY THE

CHANCERY DIVISION

AND IN

LUNACY

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL.

LISTER & CO. *v.* STUBBS.

C. A.
1890
STIRLING, J.
April 25, 26.
C. A.
May 3, 5.

[1890 L. 909.]

Principal and Agent—Corrupt Bargain by Agent for Commission—Investment of such Moneys by Agent—Following Moneys—Money had and received.

The Plaintiffs, a manufacturing company, employed the Defendant, who was their foreman, to buy for them certain materials which they used in their business; and the Defendant, under a corrupt bargain, took from one of the firms of whom he so bought large sums by way of commission, a portion whereof he invested. The Plaintiffs brought an action against the Defendant to recover the moneys so paid to him, claiming to be entitled to follow such moneys into the investments thereof; and they moved for an injunction to restrain the Defendant from dealing with the investments or for an order directing him to bring the moneys and the investments into Court:—

Held (affirming the judgment of *Stirling*, J.), that the relation between the Defendant and the Plaintiffs was that of debtor and creditor, and not that of trustee and *cestui que trust*, and that the Plaintiffs were not entitled to the order.

THE Plaintiff company carried on the business of silk-spinners, dyers, and manufacturers at *Bradford*; and the Defendant *Stubbs*, who was a foreman dyer in their employment, had for some years been entrusted by them and their predecessor in the business with the purchase at market prices of the stuffs which they used in the process of dyeing. Amongst other persons with whom he

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dealt were the firm of *Varley & Co.*, drysalters of *Leeds*, to whom he gave, on behalf of his principals, orders for large quantities of goods, and from whom he received, in consideration of these orders and without the knowledge of the Plaintiffs, large sums by way of commission.

It appeared from the evidence that this was done under an arrangement to the following effect: Messrs. *Varley & Co.* made up every month an account of the goods which had been delivered to the Plaintiffs and paid for by them in the course of the preceding month, and a commission on the sum paid to Messrs. *Varley* by the Plaintiffs, varying according to class of goods, was ascertained. The amount of the commission so ascertained was then drawn by Messrs. *Varley & Co.* from their bankers, and was handed over to the Defendant *Stubbs*. It was alleged by the Plaintiffs that the money so paid to the Defendant amounted, between the 30th of September, 1881, and the 31st of March, 1890, to £5541 5*s.* 4*d.*, of which a large amount had been from time to time invested by the Defendant in the purchase of freehold land in the county of *York* and in other investments; but a portion of it was still in the shape of cash.

The Plaintiffs, on discovering that secret profits and commissions on business had been thus received by *Stubbs*, sought to follow them into the investments thereof, and brought this action against *Stubbs*, claiming (*inter alia*), (1) the £5541 5*s.* 4*d.*; (2) damages, and an inquiry as to the amount; (3) the necessary accounts and inquiries as to the profits making up the £5541 5*s.* 4*d.*, and all other secret profits and commissions received by the Defendant, and payment with interest; and (4) an inquiry what property and securities represented such secret profits and proper conveyances and transfers thereof, and a receiver thereof meanwhile.

The Plaintiffs then moved for an interlocutory injunction to restrain the Defendant *Stubbs* from dealing with the real estate upon which a portion of these moneys had been invested, and for an order directing him to bring the other investments and cash into Court.

The motion came on for hearing before Mr. Justice *Stirling* on the 25th of April, 1890.

Hastings, Q.C., and *Ashton Cross*, for the Plaintiffs:—

The evidence shews that the Defendant was in the employment of the Plaintiffs as foreman dyer at a salary of 35*s.* a week originally, increased from time to time until it became £500 a year in 1888, and from that time and until he left the Plaintiffs' service £550 a year. The Defendant wrongfully received moneys as commission or bribes from a firm who supplied goods to the Plaintiffs, on orders given by the Defendant, on the authority of his principals; and he invested the moneys in purchasing houses and property and in making deposits at banks. Under these circumstances, the Plaintiffs are entitled to an injunction to restrain the Defendant from dealing with the houses and property purchased with the moneys so improperly received from the *Varleys*, and which it is submitted belonged to the Plaintiffs. There is clear authority for what is now asked in the case of *Boston Deep Sea Fishing and Ice Company* v. *Ansell* (1), where the defendant had received certain bonuses, and was ordered to account for them; and in the case of *Morison* v. *Thompson* (2), where the defendant was ordered to account. The moneys received were, as submitted, actually those of the Plaintiffs, and the Defendant should be made to account for them, and he ought to be restrained from dealing with the property in which he invested those moneys until the hearing of the action, and ought to bring the rest of the moneys and the securities for them into Court.

[The cases of *Freeman* v. *Cox* (3) and *London Syndicate* v. *Lord* (4) were also referred to.]

Fischer, Q.C., and *J. G. Wood*, for the Defendant:—

Assuming that the allegations are true, that the Defendant received commissions or bribes, still the moneys never were the property of the Plaintiffs, and they cannot maintain an action for the recovery of them; but the very foundation of the action is for moneys had and received to and for the use and payment of the Plaintiffs. The case is amply covered by the decision in *Metropolitan Bank* v. *Heiron* (5), where it was held that such a

(1) 39 Ch. D. 339.
(2) Law Rep. 9 Q. B. 480.
(3) 8 Ch. D. 148.
(4) Ibid. 84.
(5) 5 Ex. D. 319.

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transaction as in this case was an ordinary debt, and that the plaintiffs would be, if they made out their case, ordinary creditors; but in fact they have failed to connect the moneys invested by the Defendant with the commissions or bribes. The Defendant had been a valuable servant, and had received large sums of money from the Plaintiffs while in their service. The moneys invested were not the Plaintiffs'. When the Plaintiffs got their judgment as for a mere ordinary debt, they could enforce it. The case of *Morison* v. *Thompson* (1) has nothing to do with this case.

Hastings, in reply.

STIRLING, J.:—

This is a motion which seeks to restrain the Defendant from dealing with certain property which is alleged to be in truth the property of the Plaintiff company. The action was brought under somewhat remarkable circumstances. [His Lordship then stated the facts, and continued:—] I need not say that a more gross breach of duty it is impossible to conceive, if that be the true state of the facts; and there cannot be a question that if that be established, the Defendant is liable to account to the Plaintiffs for every penny which he has so wrongfully received from Messrs. *Varley*. But that is not the right which at this moment is sought to be enforced as against the Defendant. The Plaintiffs assert that they can go much further, and that they can follow the moneys so wrongfully received into investments which, it is alleged, the Defendant has made of them; and the question which I have to consider is, whether, under the circumstances, that right exists. There can be no doubt that if the moneys had been paid by the Plaintiffs to the Defendant, to be applied by him in payment of the goods ordered, then the Defendant would have received those moneys in a fiduciary capacity, and they would have come to his hands clothed with a trust, to be applied only for a specific purpose, and if he diverted them to any other purpose, or to his own use, the master could follow them. That was established by the well-known case of *Taylor*

(1) Law Rep. 9 Q. B. 480.

v. *Plumer* (1), in which it was held that where a broker, who received moneys for investment in a particular form invested them in another form, with a view of appropriating them to his own use, the principal who had entrusted the moneys to him for the special purpose could follow them into the investment actually made. But here no money passed from the Plaintiffs to the Defendant, and the question is, whether the sums which the Defendant received from Messrs. *Varley* fall under that rule. No case was cited in which the precise point has been decided; but two cases were cited—one upon each side, and they were much relied on. One is the case of *Morison* v. *Thompson* (2), and the other is the case of *Metropolitan Bank* v. *Heiron* (3). Both those cases deserve careful consideration.

In *Morison* v. *Thompson* the facts were these: The plaintiff authorized the defendant to negotiate for the purchase of a particular ship on the basis of an offer of £9000; but eventually the ship was purchased through the defendant for £9250. Some time prior to the sale, an arrangement had been made between the vendor and a broker named *Scott*, through whom the ship was sold, that if *Scott* could sell the ship for more than £8500 he might retain for himself whatever could be obtained in excess of that amount—*Scott* being the agent of the vendor. The defendant was aware of this arrangement at the time when he was negotiating with *Scott* for the purchase of the vessel; but it was unknown to the plaintiff, and before the sale it was arranged between *Scott* and the defendant, without the knowledge or sanction of the plaintiff—*Scott* being, as I have said, the agent of the vendor *Smith*—that the defendant should receive from *Scott* a portion of such excess of purchase-money. The vessel having been sold for more than the £8500, the sum of £225, part of the excess, being the sum for which the action was brought, was, without the knowledge or sanction of the plaintiff, paid by *Scott* to, and retained by, the defendant. It was found by the jury, first, that the defendant was the agent of the plaintiff for the purpose of purchasing the ship as cheaply as she could be got; and, secondly, that the plaintiff could have got the vessel

(1) 3 M. & S. 562-574. (2) Law Rep. 9 Q. B. 480.
(3) 5 Ex. D. 319.

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cheaper but for the arrangement between the vendor and *Scott*; and a verdict was thereupon entered for the plaintiff for £225, on a count for money had and received, with leave to move to enter a verdict for the defendant. Then a rule was obtained to enter the verdict for the defendant; and the only question raised upon the rule was, whether the plaintiff was entitled to recover the money in question under the common count for money had and received. It was contended in support of the rule, that the only form of action maintainable, if at all, under the circumstances against the defendant, was an action to recover damages for breach of duty; that in such an action the amount received by the defendant from *Scott* would not necessarily be the true measure of damages, and that it could not be regarded as the money of the plaintiff, or as received for his use. It was contended, further, that at the utmost the defendant could only be regarded as trustee for the plaintiff of the money in question, and that, being only entitled to it in equity, the plaintiff could not maintain an action to recover it at law. Those contentions were overruled. The judgment was a long one, and I do not propose to go through it, but I will read the concluding paragraphs at page 486: "In our judgment the result of these authorities is, that whilst an agent is bound to account to his principal or employer for all profits made by him in the course of his employment or service, and is compelled to account in equity, there is at the same time a duty, which we consider a legal duty, clearly incumbent upon him, whenever any profits so made have reached his hands, and there is no account in regard to them remaining to be taken and adjusted between him and his employer, to pay over the amount as money absolutely belonging to his employer. This was precisely the case in regard to the money in question acquired by the defendant in the course of his employment without the knowledge or sanction of the plaintiff; it was actually in his hands, subject to an immediate duty to hand it over to his employer. Under such circumstances the money, being the property of the employer, can only be regarded as held for his use by the agent, and must consequently be recoverable in an action for money had and received."

I stop here to remark, that it appears to me that the facts of

that case in some respects resemble those with which I have to deal. There is no statement in that case that the money ever came to the hands of the defendant from the plaintiff; on the contrary, the defendant received it from *Scott*, just as in this case the present Defendant received the money from Messrs. *Varley*. That case appears to me to have decided, first, that there was a right in the plaintiff, the principal, to recover the money from his agent; that, further, there was not merely an equitable demand, but a legal right to recover it, and that the legal right was not for damages, but to receive the ascertained sum in an action for money had and received.

The Metropolitan Bank v. *Heiron* (1) was a different case. There the action was brought in 1879 against a former director of the company to recover £250, on the ground that the defendant had received it from a debtor to the company as a bribe to induce him to use his influence to obtain favourable terms of compromise for the debtor. It appeared that in 1872 the defendant, by false and fraudulent statements as to the pecuniary position of *F. Daniells*, induced the bank to accept from *Daniells* the sum of £50 in satisfaction of a claim which they had against *Daniells* for £3800. The 5th paragraph of the statement of claim alleged that, "While the said *F. Daniells* was still liable to the bank in the sum of £3800, the defendant was a director of the said bank and attended meetings of the directors, and as such took an active part in the management and conduct of the business of the bank, and performed the various duties, and acted otherwise in the capacity, of a director, and stood in a fiduciary relation towards the bank. The said *F. Daniells*, having represented to the bank that he was unable to pay to the bank the whole of the sum of £3800, requested the defendant to endeavour to procure a settlement of the said claim of the bank and to use his influence and position as a director for that purpose, which the defendant agreed to do, and while the defendant was acting as a director as aforesaid, handed to the defendant, and the defendant received from him, the sum of £250 for the purpose of so settling the said claim. The defendant did not pay or hand over to the bank the said sum of £250, nor any part thereof, but

(1) 5 Ex. D. 319.

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wrongfully, and in breach of his trust and fiduciary relation to the bank, retained the said sum for his own use, and by misrepresentations to the bank induced the bank to agree to accept, and the bank did accept, the sum of £50 from the said *F. Daniells* in discharge of the said claim of the bank against him." The defence was a plea of the *Statute of Limitations*, and that was held to be valid by Mr. Justice *Stephen*. The case then went to the Court of Appeal; and that Court held that the claim was not a legal but an equitable one, and that the Court of Equity, acting in analogy to the cases at law with regard to concealed fraud, would not entertain the action more than six years after the fraud had been discovered; and as they held that the fraud had been discovered more than six years before, that defence succeeded. The decision is not precisely in point; but the judgments of the Court of Appeal throw very great light, as it seems to me, upon cases of this nature. Lord Justice *James* said (1): "The ground of this suit is concealed fraud. If a man receives money by way of a bribe for misconduct against a company or *cestui que trust*, or any person or body towards whom he stands in a fiduciary position, he is liable to have that money taken from him by his principal or *cestui que trust*. But it must be borne in mind that that liability is a debt only differing from ordinary debts in the fact that it is merely equitable, and in dealing with equitable debts of such a nature Courts of Equity have always followed by analogy the provisions of the *Statute of Limitations*. . . ." Then he held that the person against whom the suit was brought had "a clear right to avail himself of the lapse of time against the claim as much as if it had been a mere legal demand." The present Master of the Rolls said (2): "It seems to me that the only action which could be maintained by the company or by the liquidator of the company against this defendant would be an action in equity founded upon the alleged fraud of the defendant. Neither at law nor in equity could this sum of £250 be treated as the money of the company, until the Court, in an action by the company, had decreed it to belong to them on the ground that it had been received fraudulently as against them by the defendant." Lord Justice *Cotton* gave a judgment

(1) 5 Ex. D. 323. (2) 5 Ex. D. 324.

which, in my point of view, is very important. He said (1): "In favour of the appeal it was urged that no time runs against a breach of trust; but that argument was founded on an insufficient definition of what is meant by a breach of trust. Where a trustee has a fund in his possession and wastes it either by neglect of duty or by doing an act not justified, and the *cestui que trust* comes to recover his money, no time will bar his suit, for it is a claim by the *cestui que trust* against the trustee for money or property which was in the possession of the trustee, and must be considered as in the possession of the trustee for the benefit of the *cestui que trust* until the trustee duly discharges himself. To such a suit there is no bar by statute. But the present case is not such a case. Here the money sought to be recovered was in no sense the money of the company, unless it was made so by a decree founded on the Act by which the trustee got the money into his hands. It is a suit founded on breach of duty or fraud by a person who was in the position of trustee, his position making the receipt of the money a breach of duty or fraud. It is very different from the case of a *cestui que trust* seeking to recover money which was his own before any act wrongfully done by the trustee. The whole title depends on its being established by a decree of a competent Court that the fraud of the trustee has given the *cestui que trust* a right to the money."

The question then is, under which head does the present case fall? Is this a case in which the suit is founded on a breach of duty or fraud by a person who was in the position of a trustee, or is it a case of *cestui que trust* seeking to recover money which was his own before any act wrongfully done by the trustee? It seems to me that the decision in *Morison* v. *Thompson* (2), which I assume to apply, does not settle the question I have to decide. I assume that the money could be recovered as money had and received to the use of the Plaintiffs at law; but it seems to me that it is not a necessary consequence that the Plaintiffs in this case could follow the money. It is not true as a general proposition that in every case in which an action for money had and received will lie, the money can be followed in the hands of the defendant. Take a case in which an action for

(1) 5 Ex. D. 325. (2) Law Rep. 9 Q. B. 480.

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money had and received would lie—money paid by a plaintiff to a defendant in pursuance of a contract for which the consideration totally failed. Take, for instance, the case of a deposit paid upon a contract by a vendor for the sale of real estate—a contract properly and honestly entered into. Suppose that in the course of the carrying it out it is discovered that the vendor had no title whatever to the property: then the purchaser would be entitled to rescind the contract; and the consideration having wholly failed, he would be entitled to recover the deposit, according to the authorities, as money had and received to his use. Suppose that in the meantime the vendor, believing himself to be honestly entitled to the money, had invested it in his business and had been making large profits out of it: it has never been held or suggested that the purchaser in that case could follow the money and claim the profits. In truth, what was decided in *Morison* v. *Thompson* (1) came to no more than this, that the plaintiff had a legal demand which he could assert in action for money had and received. No doubt the case might have arisen (as in *Taylor* v. *Plumer* (2)) at law of following the money; but *Morison* v. *Thompson* was not that case, and no authority has been cited to me in which at law money received under such circumstances has been followed. The true test appears to me to be that which was laid down by Lord Justice *Cotton* in the case of *Metropolitan Bank* v. *Heiron* (3), in the passage in the judgment which I have read—is this a case of a *cestui que trust* seeking to recover money which was his before any act wrongfully done by the trustee? Suppose that the Plaintiffs, to apply the test, had handed over the money to the Defendant to be applied in payment for the goods which were purchased, and that he retained part of it. What was the wrongful act? The retention of it for his own use. Whose was the money before that? Plainly the money of the principal. It came into the hands of the agent clothed with a trust. That is not the present case. The Defendant simply gave orders to Messrs. *Varley* for goods which were supplied to the Plaintiffs and paid for by them. Those orders were, no doubt, given by the Defendant in the expectation that a commission would in course of time be paid

(1) Law Rep. 9 Q. B. 480. (2) 3 M. & S. 562. (3) 5 Ex. D. 325.

to him on the purchase-money; but there was not any legal obligation on the part of Messrs. *Varley* to pay it. If they had not paid it the Defendant would have been, so far as I see, without remedy in any Court of law. His only resource—I will not call it remedy—would have been to cease sending orders to Messrs. *Varley*. Apply then the same test. What is the wrongful act done? The receipt of the money in breach of duty. Whose money was it before the wrongful act? It seems to me that it was money, not of the present Plaintiffs, but of Messrs. *Varley*, and that it could not have been laid hold of in the hands of Messrs. *Varley* by the Plaintiffs. Applying that test, I come to the conclusion that the Plaintiffs are not entitled to follow the money; and therefore the injunction, so far as it seeks to restrain the Defendant from dealing with the property in which this money has been, as alleged, invested, must fail.

T. F. M.

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The Plaintiffs appealed. The appeal was heard on the 3rd of May, 1890.

C. A.

Crackanthorpe, Q.C., *Hastings*, Q.C., and *Ashton Cross*, for the Appellants:—

The Defendant is our agent. With money of ours wrongfully in his hands, and procured by a corrupt bargain, he has purchased property; and we are entitled to follow our money into the investments which represent it: *Hay's Case* (1); *Morison* v. *Thompson* (2). The money in question was our own money, received by the Defendant as a bribe for misconduct, and we are entitled to take it from him: *Metropolitan Bank* v. *Heiron* (3). We shew by our affidavits that the Defendant has money in his hands which belongs to us. He has not answered those affidavits, and that is a sufficient admission on his part under Order XXXII., rule 6, to entitle us to an order before trial that so much of our money as is in cash, or in investments which can be so dealt with, shall be paid or brought into Court: *Jervis* v. *White* (4); *Freeman* v. *Cox* (5); *Hampden* v. *Wallis* (6); *Dunn* v.

(1) Law Rep. 10 Ch. 593.
(2) Ibid. 9 Q. B. 480.
(3) 5 Ex. D. 319.
(4) 6 Ves. 738.
(5) 8 Ch. D. 148.
(6) 27 Ch. D. 251.

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Campbell (1); *Porrett* v. *White* (2); *Wanklyn* v. *Wilson* (3). There was here in effect a fiduciary relation between the Plaintiffs and the Defendant.

Cozens-Hardy, Q.C., and *J. G. Wood*, for the Defendant, were not called upon.

COTTON, L.J.:—

The case here is this: The Defendant, being in the confidential employment of the Plaintiffs, made a corrupt bargain with persons who supplied the partnership with dye stuffs. The bargain was most manifestly corrupt; but does that make the money which the Defendant received in pursuance of that bargain the money of the Plaintiffs? Mr. Justice *Stirling*, in the course of his judgment, referred to my decision in the case of *Metropolitan Bank* v. *Heiron* (4). I think that I took a correct view in my judgment in that case; and in my opinion this is not the money of the Plaintiffs, so as to make the Defendant a trustee of it for them, but it is money acquired in such a way that, according to all rules applicable to such a case, the Plaintiffs, when they bring the action to a hearing, can get an order against the Defendant for the payment of that money to them. That is to say, there is a debt due from the Defendant to the Plaintiffs in consequence of the corrupt bargain which he entered into; but the money which he has received under that bargain cannot, in the view which I take, be treated as being money of the Plaintiffs, which was handed by them to the Defendant to be paid to Messrs. *Varley* in discharge of a debt due from the Plaintiffs to Messrs. *Varley* on the contract between them.

When the facts are ascertained, the Plaintiffs will have the opportunity of setting aside the contract altogether and returning the stuffs, or, without setting aside the contract, of suing Messrs. *Varley* for the money which they have fraudulently handed over to the Defendant. But in my opinion the moneys which under this corrupt bargain were paid by Messrs. *Varley* to the Defendant cannot be said to be the money of the Plaintiffs

(1) 27 Ch. D. 254, n.
(2) 31 Ch. D. 52.
(3) 35 Ch. D. 180.
(4) 5 Ex. D. 319.

before any judgment or decree in some such action has been made. I know of no case where, because it was highly probable that if the action were brought to a hearing the plaintiff could establish that a debt was due to him from the defendant, the defendant has been ordered to give security until that has been established by the judgment or decree. The plaintiff, if so advised, might apply for an immediate order under Order XIV., and then, if the defendant applied to defend, he could only do so on such terms as the Judge might think reasonable. But in the present case that course has not been taken. In my opinion, however corrupt the bargain was, we cannot hold that, under the circumstances of this case, the money was the money of the Plaintiffs.

Hay's Case (1) was cited to us; but that was a very different case. There *Hay* himself was a director of the plaintiff company, and a cheque had been drawn ostensibly in part payment for certain property to be bought by the company, but which was in fact not drawn for any such purpose. It was drawn for the purpose of being paid to *Hay*, to enable him to pay for his shares. That is a very different thing. There *Hay*, a director, had received this cheque, which was drawn ostensibly for a particular purpose, and which he knew was intended to be applied for that particular purpose, and it was applied to an entirely different purpose, which was, as against the plaintiff company, fraudulent. That being so, the Judges were quite right in holding that that cheque was still to be considered the money of the company, and therefore that the payment of that cheque in discharge of the calls on the shares was nothing but paying the company with its own money, and that *Hay* was still liable to pay the calls. That is entirely different, in my opinion, from the case which is here before us, and I think that the first and main ground upon which the Plaintiffs base their case cannot avail them.

Then there is said to be a second point, namely, that there is in this case such an admission by the Defendant that this sum of money is due, that we ought to order it to be paid into Court, as security for the debt which, *primâ facie*, the Plaintiffs will make

(1) Law Rep. 10 Ch. 593.

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out to be due to them. In my opinion, however, there is no case at all for anything of that sort being done, unless it is done as a condition of allowing the debtor to defend. But that is not what is asked for here.

Then there were a number of cases quoted in which trustees were held liable to pay into Court sums of money which *primâ facie* were due from them. But in those cases the moneys were not due merely as debts, but were due from the defendants as moneys held by them as trustees for the plaintiffs, their *cestuis que trust*; so that if, as I think, the Plaintiffs' first contention is wrong, those cases will not in any way help them. The only question really discussed in those cases was whether there was a sufficient admission to enable the Court to order the trustee to pay the money into Court. But here, if the money sought to be recovered is not the money of the Plaintiffs, we should be simply ordering the Defendant to pay into Court a sum of money in his possession because there is a *primâ facie* case against him that at the hearing it will be established that he owes the money to the Plaintiffs. In my opinion, that would be wrong in principle. I will not go through the cases that have been cited to us on behalf of the Plaintiffs; but if we were to order the Defendant to give the security asked for, it would be introducing an entirely new and wrong principle—which we ought not to do, even though we might think that, having regard to the circumstances of the case, it would be highly just to make the order.

In my opinion, the appeal fails.

LINDLEY, L.J.:—

If we were to accede to this application, I do not think that *Stubbs* could complain; but the question is, whether, having regard to the rules by which we are governed, we can properly make the order. I am clearly of opinion that we cannot. The real state of the case as between *Lister & Co.* and Messrs. *Varley* and *Stubbs* is this: *Lister & Co.*, through their agent *Stubbs*, buy goods of Messrs. *Varley* at certain prices, and pay for them. The ownership of the goods of course is in *Lister & Co.*; the ownership of the money is in Messrs. *Varley*. Then Messrs.

Varley have entered into an arrangement with *Stubbs*, who ordered the goods of them, to give *Stubbs* a commission. That is what it comes to. What is the legal position between Messrs. *Varley* and *Stubbs*? They owe him the money. He can recover it from them by an action, unless the illegality of the transaction afford them a defence; but the Appellants have asked us to go further, and to say that Messrs. *Varley* were *Stubbs'* agents in getting his commission from *Lister & Co.* That appears to me to be an entire mistake. The relation between Messrs. *Varley* and *Stubbs* is that of debtor and creditor—they pay him. Then comes the question, as between *Lister & Co.* and *Stubbs*, whether *Stubbs* can keep the money he has received without accounting for it? Obviously not. I apprehend that he is liable to account for it the moment that he gets it. It is an obligation to pay and account to Messrs. *Lister & Co.*, with or without interest, as the case may be. I say nothing at all about that. But the relation between them is that of debtor and creditor; it is not that of trustee and *cestui que trust*. We are asked to hold that it is—which would involve consequences which, I confess, startle me. One consequence, of course, would be that, if *Stubbs* were to become bankrupt, this property acquired by him with the money paid to him by Messrs. *Varley* would be withdrawn from the mass of his creditors and be handed over bodily to *Lister & Co.* Can that be right? Another consequence would be that, if the Appellants are right, *Lister & Co.* could compel *Stubbs* to account to them, not only for the money with interest, but for all the profits which he might have made by embarking in trade with it. Can that be right? It appears to me that those consequences shew that there is some flaw in the argument. If by logical reasoning from the premises conclusions are arrived at which are opposed to good sense, it is necessary to go back and look again at the premises and see if they are sound. I am satisfied that they are not sound—the unsoundness consisting in confounding ownership with obligation. It appears to me that the view taken of this case by Mr. Justice *Stirling* was correct, and that we should be doing what I conceive to be very great mischief if we were to stretch a sound principle to the extent to which the Appellants ask us to stretch it, tempting as

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it is to do so as between the Plaintiffs and *Stubbs*. I think that the appeal ought to be dismissed.

BOWEN, L.J.:—

I am of the same opinion, and I do not think that I need add anything to what has been said.

Appeal dismissed with costs.

Solicitors: *Speechly, Mumford & Co.*, agents for *Mumford & Johnson, Bradford; W. & J. Flower & Nussey*, agents for *Berry, Robinson, & Scott, Bradford.*

W. W. K.

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In re PORTUGUESE CONSOLIDATED COPPER MINES, LIMITED.
Ex parte BADMAN.
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Company—Directors—Invalid Allotment of Shares—Ratification—Principal and Agent.

The articles of association of a company provided that the shares should be allotted by the directors, and that the first directors should be appointed by the subscribers to the memorandum of association. On the 22nd of October, 1888, the subscribers to the memorandum appointed four persons directors. On the 24th of October a meeting of directors was held, at which two only attended, and they allotted shares to *A.* and *B.*, who had sent in applications. The Court subsequently held that this meeting was irregular, and that the allotments were invalid. Notice of the allotments was sent on the following day to *A.* and *B.* *A.* refused to pay the allotment-money on his shares; *B.* paid his to the bankers under protest; but the evidence failed to prove that either of them revoked his application or repudiated his shares on the ground of the allotment being invalid. On the 24th of December the company brought an action against *A.* for his allotment-money, and recovered judgment. On the 7th of January, 1889, another meeting of directors was held, at which two only attended, and they passed a resolution that the certificates of the shares allotted should be sealed and issued to the allottees. *B.* refused to accept the certificates of his shares, but did not distinctly repudiate the allotment. On the 16th of January another meeting of directors was held, at which all four directors attended, and the chairman signed the minutes of the last meeting. On

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the 7th of March a resolution was passed at a duly constituted meeting of the directors, formally confirming the allotment of shares made on the 24th of October. Afterwards *A.* and *B.* moved for a rectification of the register by striking out their names:—

Held (affirming the decision of *North*, J.), that, although the original allotment of shares was invalid, it had been ratified by the company, and was binding on the allottees; that, with respect to *A.*, such ratification was complete on the 24th of December, 1888, when the action against him was commenced; and that, with respect to both *A.* and *B.*, there was a valid ratification on the 16th of January and the 7th of March, 1889:

Held, also, that having regard to the fact that neither *A.* nor *B.* had repudiated their shares on the ground of the invalidity of the allotment, the ratification in both cases was made within a reasonable time.

Bolton Partners v. *Lambert* (1) followed.

SEPARATE motions were made under sect. 35 of the *Companies Act*, 1862, on the part of *Frederick A. Badman* and *William Henry Bosanquet* to rectify the register of members of the *Portuguese Consolidated Copper Mines, Limited*, by striking out their respective names as holders of shares allotted to them, on the ground that they had withdrawn their respective applications for shares before any valid resolution to allot them was passed by the directors.

There was also a summons on the part of *F. A. Badman* to set aside a judgment that had been obtained against him under Order XIV. of the rules of the Supreme Court, 1883, for the money payable on application and allotment on the shares in respect of which he was now seeking to have the register of members rectified.

The company was registered on the 20th of October, 1888. The articles of association provided that the shares should be allotted by the directors to such persons at such times, on such terms, and in such manner as the directors should think proper; that the directors should be not more than ten or less than three in number; that the qualification of a director should be the holding of at least forty shares; and that the first directors should be appointed by the majority of the subscribers to the memorandum of association.

On the 22nd of October, 1888, a meeting of the subscribers to the memorandum of association was held, at which they were all

(1) 41 Ch. D. 295.

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present, and they passed unanimously a resolution that the following gentlemen be appointed directors of the company:—Lord *Inchiquin*, Captain *Skewis*, *Mathew Loam*, *Richard Wood*, and *J. H. Hoyle*; the latter gentleman to take his seat after allotment. All these gentleman were named in the prospectus as the first directors of the company.

F. A. Badman signed an application in the usual form for 50 shares in the company, and *W. H. Bosanquet* for 200 shares.

On the 24th of October two of the directors, Captain *Skewis* and *R. Wood*, met, and allotted to *Badman* and *Bosanquet* the number of shares they had applied for, and made allotments to other persons who had applied for them; but no allotments were made at that meeting to the directors. The meeting was adjourned till the following day, when the same directors attended, and allotted forty shares to each of the directors. Notice of the allotments was immediately sent to the allottees. The meeting was again adjourned to the 26th of October, when Captain *Skewis*, *Wood*, and *Loam* were present, and they passed a resolution confirming the allotments of the previous days.

The allotments made at the meeting of the 24th of October were held by the Court of Appeal, affirming Mr. Justice *North*, to be void, on the ground that notice had not been sent to all the directors: *In re Portuguese Consolidated Copper Mines*; *Steele's Case*. (1)

Badman sent a cheque for the money due on application—10*s*. per share—but afterwards stopped the cheque at the bankers; and he sent the letter of allotment back to the secretary, with a letter saying that he wished to be relieved from the shares and hoped the directors would not enforce the claim against him; but he did not repudiate the shares on the ground that the allotment was invalid. The secretary sent back the letter of allotment, saying that the directors could not receive it. He did not pay the money payable on allotment—£1 10*s*. per share.

Bosanquet paid the money payable on application, and also on allotment; but he said that he paid the allotment-money under protest; and he wrote to the secretary that he considered the conduct of the directors in allotting the shares in the way they

(1) 42 Ch. D. 160.

had done was unfair; but he did not repudiate the shares on the ground of the invalidity of the allotment.

On the 7th of January, 1889, a meeting of directors was held, at which two only attended. They passed a resolution that the certificates of the shares which had been allotted should be sealed and issued in exchange for the allotment letter. This was accordingly done, and notices to the shareholders were sent on the following day. *Bosanquet* wrote in reply, that he did not intend to take up the certificates at present, and was in hopes that he should soon be in a position to produce evidence to compel the company to return his money.

On the 16th of January another meeting was held, at which all four of the original directors were present. Lord *Inchiquin* was in the chair, and his name appeared as signing the minutes of the last meeting, although it was not stated in the minutes of the second meeting that he had done so.

After the decision in *Steele's Case* (1), *Bosanquet* wrote to the secretary claiming a return of his money, and asking that his case should be governed by that decision.

On the 7th of March, 1889, at a duly constituted meeting of the directors of the company, it was resolved: "The allotment of shares in the company having been called in question by several shareholders, the directors, while not in any way admitting the existence of any irregularity in the allotment, deem it advisable to pass a resolution confirming the allotment." A second resolution was passed in the following terms: "Resolved that the allotment of shares in the company made on the 24th, 25th, and 26th days of October, 1888, be and the same are hereby confirmed, and that the secretary do forthwith communicate this resolution to the shareholders."

The facts relating to the judgment obtained against the applicant *Badman* were these: On the 24th of December, 1888, the company commenced an action against him in the Queen's Bench Division to recover the £25 on his cheque and the £75 payable on allotment. Application was made by the company for judgment in that action under Order XIV. An order was made giving the Defendant leave to defend if he paid £100 into

(1) 42 Ch. D. 160.

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Court within a week. The money was not paid into Court, and judgment was signed against him.

On the summons the Court considered that if necessary the judgment could be set aside; and even if it stood, it would not be a bar to *Badman's* name being removed from the register. The motions were heard before Mr. Justice *North* on the 10th of February, 1890.

Edward Beaumont, for *Badman*:—

On the facts *Badman* withdrew the offer to take shares. If that is so, the case is exactly like *Steele's Case* (1), where the Court of Appeal, affirming the decision of this Court, held that the allotments made by the directors were void.

Cozens-Hardy, Q.C., and *W. Baker*, for the company:—

If there was any withdrawal in fact, the allotment made by unauthorized agents was subsequently confirmed at the meeting of the 7th of March. It is not sought to impeach the proceedings at that meeting. Such confirmation relates back to the unauthorized allotment, and validates it, notwithstanding attempts to withdraw the offer in the meantime: *Bolton Partners* v. *Lambert* (2).

Edward Beaumont, in reply, in *Badman's* case.

Napier Higgins, Q.C., and *Farwell*, for *Bosanquet*:—

This case is really governed by *Steele's Case*. *Bolton Partners* v. *Lambert* was cited before the Court of Appeal, and notwithstanding that they upheld the decision of this Court.

[*Cozens-Hardy*:—*Bolton Partners* v. *Lambert* was cited for the purpose of shewing that certain memoranda signed by the directors on the 27th of October, related back, but the Court held that such memoranda could not make the resolutions otherwise invalid valid.]

It has been held that a notice to quit by an unauthorized agent cannot be made a good notice by subsequent ratification: *Right* v. *Cuthell* (3); *Doe* v. *Walters* (4).

(1) 42 Ch. D. 160.
(2) 41 Ch. D. 295.
(3) 5 East, 491, 498.
(4) 10 B. & C. 626.

Cozens-Hardy, Q.C., and *W. Baker*, for the company.

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NORTH, J. (without calling on counsel for the company in *Bosanquet's* case, after stating the facts, assuming for the purpose of his judgment that the application had in each case been revoked, continued):—

The point arises from the resolution passed by all the directors on the 7th of March, coupled with the decision of the Court of Appeal in the case of *Bolton Partners* v. *Lambert* (1). The facts of that case make it extremely like the present. A party of directors—in that case constituting a committee, in this case being two out of four on the 24th, and three out of four on the 26th of October—profess to act in a way in which they had no authority to act, and could not bind the company; but some time afterwards, in both cases, a resolution is passed by the directors, who had power to bind the company, ratifying what had been done by the limited number of directors who had no power to do it. The Court of Appeal held in that case that, although the offer which had been made had been revoked by the person who had made the offer in the meantime, the subsequent ratification had the effect of relating back and binding the person who had negotiated with the company and prevented his withdrawing his offer; so that it comes to this, that if an offer to purchase is made to a person who professes to be the agent for a principal, but who has no authority to accept it, the person making the offer will be in a worse position as regards withdrawing it than if it had been made to the principal; and the acceptance of the unauthorized agent in the meantime will bind the purchaser to his principal, but will not in any way bind the principal to the purchaser. I cannot distinguish between that case and this. It is not open to me to do anything but to accept that case as decided. To one or two little distinctions which have been attempted to be made between that case and this, I do not think I can pay any attention. If there is anything in those distinctions, they must be addressed to the Court of Appeal, which decided that case. I do not feel at liberty to refrain from acting on a decision which substantially governs the present case upon

(1) 41 Ch. D. 295.

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the ground of slight distinctions, one of which, at least, I cannot doubt must have been present to the minds of the Court, if there is anything in it, although there is no trace of it found on the face of the report. Under these circumstances that case governs the present; and all that I can say is that I am glad to have such an authority to guide me; for I am afraid I should have gone wrong if I had not had the assistance of that decision.

D. P.

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From this judgment *Bosanquet* and *Badman* appealed. The appeal came on to be heard on the 19th of May, 1890.

Napier Higgins, Q.C., and *Farwell*, for *Bosanquet*:—

The allotment of shares at the meeting of the 24th of October was not voidable only, it was entirely void. That was decided in *Steele's Case* (1). There was no contract at all to take shares; the proposed directors were specially named in the prospectus, and they were the persons to whom *Bosanquet* and the other applicants made their application, and they applied for their shares on the terms of the prospectus. Two of these directors, without the others, had no power to make any allotment: *Ernest* v. *Nicholls* (2). There being no contract, nothing that the directors could do subsequently could ratify it. A person cannot ratify the contract of a stranger who had no authority at all from him to act; he can only make a fresh contract: *Doe* v. *Walters* (3). This case is, therefore, distinguishable from *Bolton Partners* v. *Lambert* (4).

But if the acts of the meeting of the 24th of October, 1888, were capable of confirmation, the meeting of the 7th January, 1889, had no power to confirm them. Only two directors were present; they would have had no power themselves to allot the shares, and therefore they could not confirm the invalid allotment which had been made. Nor is there sufficient evidence of their resolutions; for there is no record in the succeeding meeting of the minutes being signed by the chairman.

If there was a ratification of the allotment, it was not made

(1) 42 Ch. D. 160.
(2) 6 H. L. C. 401.
(3) 10 B. & C. 626.
(4) 41 Ch. D. 295.

within a reasonable time. An allotment of shares must be made within a reasonable time of the application, or the allottee is not bound to accept them; and this holds good even though he has not in the meantime withdrawn his application: *Ramsgate Victoria Hotel Company* v. *Montefiore* (1). The same must apply to the ratification of an invalid allotment. In the present case an unreasonable time elapsed before the alleged ratification; therefore, even if *Bosanquet* did not repudiate the shares at the time, he cannot now be compelled to accept them. The resolution of the 7th of March was more than four months after the original allotment; and even if the meeting of the 7th of January had power to confirm the allotment, that was too late when we consider all the circumstances. *Bosanquet* did all he could to repudiate the shares. He remonstrated at once with the directors for their hurry and unfairness, and as soon as he had ascertained the facts he repudiated the allotment: *Mayor of Kidderminster* v. *Hardwick* (2); *Saunderson* v. *Griffiths* (3); *Lyell* v. *Kennedy* (4); *Ex parte Baily* (5); *In re Homer District Consolidated Gold Mines* (6).

Edward Beaumont, for *Badman*:—

Badman stopped his cheque for the application-money as soon as the shares were allotted, and refused to accept the allotment. He could not have acted more promptly. With respect to the alleged ratification, each case must depend on its own circumstances. In the case of a company for such a purpose as copper mining, the value of the shares fluctuates so rapidly that an applicant is put to great disadvantage unless he knows at once whether the allotment is valid or not. Even if the commencement of the action against *Badman* be taken as the date of ratification, it was two months after the allotment, and the delay was unreasonable: *Ramsgate Victoria Hotel Company* v. *Montefiore*; *Mathew's Case* (7).

[COTTON, L.J.:—We only wish to hear counsel for the Respondents on the question whether there was a ratification within a reasonable time.]

(1) Law Rep. 1 Ex. 109.
(2) Ibid. 9 Ex. 13.
(3) 5 B. & C. 909.
(4) 14 App. Cas. 437.
(5) Law Rep. 3 Ch. 592.
(6) 39 Ch. D. 546.
(7) 3 De G. & Sm. 234.

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Cozens-Hardy, Q.C., and *W. Baker*, for the Respondent company:—

The Appellants fail to shew any repudiation of their shares till after the ratification of the allotment by the company. As to *Badman*, although he refused to pay the allotment-money, he did not repudiate the allotment as being invalid till after the action had been brought. In *Steele's Case* (1) the allottee repudiated on the 25th of October, directly he received the allotment. As to *Bosanquet*, it is true that he remonstrated against the haste with which the shares had been allotted, but he did not repudiate the allotment until the proceedings had been taken in *Steele's Case*. The irregularity of the allotment was cured by the meetings of the 7th and 16th of January, 1889. In the latter meeting the chairman formally signed the minutes of the previous meeting, and everything must be taken to have been *rite actum* under the provisions of the 25 & 26 Vict. c. 89, s. 67. The ratification really dates from that time, and that was within a reasonable time after the allotment. Even if the 7th of March, 1889, when the formal resolution was passed, be taken as the date of ratification, there was no unreasonable delay, because the directors did not know till the proceedings were taken in *Steele's Case* that the validity of the original allotment was impeached.

Napier Higgins, in reply.

COTTON, L.J.:—

There are two appeals before us, and, to a considerable extent, the arguments are common to both; but we must sever them when we come to consider the question whether the ratification here was within a reasonable time.

Now, what were the facts? As regards Mr. *Bosanquet*, he applied for shares in the ordinary way, and there was an allotment made to him of all the shares he applied for. That was done at a meeting of which no notice had been sent to one of the directors, so that those who attended were not able to bind the company; but they purported to make a contract on behalf of the company to allot to him 200 shares. After that had been done,

(1) 42 Ch. D. 160.

he paid, though he says he did so under protest, the money which was to be paid by him on allotment. That was before the end of October, the allotment having been made to him on the 25th or 26th of October. Then nothing is done practically till a much later date, when there is a meeting held which determined that the certificates of shares be sealed with the seal of the company, and be issued to him and the other allottees.

Mr. *Badman* applied at the same time, and had fifty shares allotted to him. After he had received the letter of allotment, he wrote back saying that he wished to be excused, but not saying he had made no contract. The secretary sent back the allotment which he had returned, and said that the directors could not receive it.

Now, I will deal with what is common to both these cases. It was first of all said that there was something in the terms of the contract which, even if the board who did make the contract had been duly authorized to contract on behalf of the company, prevented there being any contract which would be enforced. As I understand it, it was that, according to the terms of the prospectus and articles, certain named persons were to be agents on behalf of the company to allot the shares and to determine whether there was to be any allotment. But that would not be part of the contract; it might be a ground, if it could be maintained, for setting aside the contract, on the ground that it was wrong that that contract should be made by the persons who made it. The prospectus gives the form of application, which was this: "Having paid to the company's bankers the sum of £ , being a deposit of 10*s.* per share on application, I request you to allot me that amount on the terms of the company's prospectus." Now, what do the terms of the company's prospectus mean? Do they mean on condition that the allotment is made by the persons named in the prospectus as about to make that allotment? I cannot think it does. It applies to the terms which are to be introduced and bind the parties when the contract is made, which are these:— First, that the money is to be "payable as follows: 10*s.* on application, £1 10*s.* on allotment, and the balance as and when required in calls of not more than £1 each, at intervals of not less than two months each." The other term is: "In cases where

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the number of shares allotted is less than the number of shares applied for, the surplus paid on deposit on such shares will be credited towards the amounts payable on allotment. Should no allotment be made, the deposits will be returned in full."

Now those are the terms according to which each makes his application, and according to which he asks to have an allotment made to him; and it is not said that anything has been done with reference to that which prevents this contract to take the shares being enforced against either of these parties.

Then it is said that this Court has decided that the board which purported to make the allotment was so constituted that it could not validly make the contract on behalf of the company, and that was said to be on the ground which I have mentioned, that due notice had not been sent to one of the directors that a meeting was to be held, though, if that had been done, there would have been a sufficient numbers of directors, there being no quorum mentioned in the articles of association. And it was said that the contract of allotment being made by persons who purported to act and make a contract on behalf of the company, but were not authorized so to act, there could be no ratification except by the persons who could have originally made that contract. That, I think, is a fallacy, though I do not think, when one looks at the facts of the case, that will have to be considered—at least, as regards Mr. *Bosanquet*. There is a contract purporting to be made on behalf of the company, and if made it will be the contract of the company, and although we hold that those persons who then purported to make that contract had no power to bind the company, yet, as regards ratification, anyone who was authorized on behalf of the company to ratify that contract will be able to make it, even though they were not the persons pointed out originally to enter into the contract of allotment. I pointed out during the argument, that it really depended on the fallacy that they were considering the contract, not as a contract made on behalf of the company, but as a contract made on behalf of the individual directors who purported either to allot or afterwards confirm that allotment. It is the contract of the company, and I know of no rule at all which can allow us to say that the confirmation of the contract

may not be made by anyone who has authority on behalf of the company to confirm that contract. Here the directors have full power to do everything on behalf of the company, which is not specially reserved to the company acting in general meeting, and, therefore, in my opinion, it is not necessary to shew that those who confirmed or adopted this contract were the persons who were originally nominated as the persons who were to allot the shares.

Then we come to the question as to what ratification there was, and whether or not that ratification has been within a reasonable time. I take, first, the case of Mr. *Badman*, because that is shorter. He never repudiated the shares at all, and on the 24th of December an action was brought against him in the name of the company, the action being to enforce payment by him of the money payable on application, for which he had given a cheque which had been stopped, and on allotment. Therefore that action, which we must take to be the action of the company, properly brought on behalf of the company, was an assertion by the company that they held him to his bargain, and an election by them, if up to that time they were not bound by the unauthorized act of the men who purported to act as their agents, to adopt that as a contract made by persons whom they authorized, and whose action they ratified and confirmed. Therefore, I think, in the case of Mr. *Badman*, the ratification must be taken to be on the 24th of December—and that, in my opinion, was not an unreasonable time. As I pointed out, there was no declaration by him that he repudiated being bound, but only an application *ad misericordiam* to the directors: "I cannot pay this; I ask you kindly to allow me to be relieved from this, and not to enforce your claim against me." They treated him as being entitled to these shares, and as being a shareholder; and, although it is very true that shares in companies like this do fluctuate considerably as regards their value and prospects, yet I cannot think that at that time there was any sufficient reason for saying that it was inequitable as against him to ratify that which had been purported to be done by an insufficient body of the directors, so as to ratify and bind him by it.

Then comes the case of Mr. *Bosanquet*—and what has he done?

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I have stated what he has done as regards the payment of money on allotment; and, although it is said that he paid under protest, yet I cannot give any effect to that. We do not know to whom the protest was made. All we know is, that when he paid the £150, I think, on allotment to the bankers, he wrote on the letter of allotment, "Paid under protest." Well, I do not suppose the bankers were agents, so as to receive any notice of protest which was given to them, on behalf of the company; and one cannot, in my opinion, pay any attention to that. He did, no doubt, say that he hoped to get further evidence, and then to get off his liability; but he did not even then state that he considered the allotment was bad. He only said it was very unfair, which I think meant that he considered that the directors had allotted hastily; and he thought he might find out some reason, in consequence of his considering their conduct hasty and unfair, for getting off the contract into which he had entered. Then we find that on the 7th of January there was a resolution passed that the certificates of shares should be sealed and sent to him. They were sealed, and notice was sent to him on, the following day. Then he sends an answer that he does not at present intend to take up these shares; but that, I think, was not material as regards the point with which I am dealing. Then we come to what passed at a meeting of the directors, and which was entered in the minute book. Sect. 67 of the Act of 1862 has a bearing upon this: "Every company under this Act shall cause minutes of all resolutions and proceedings of general meetings of the company, and of the directors or managers of the company in cases where there are directors or managers, to be duly entered in books to be from time to time provided for the purpose; and any such minute as aforesaid, if purporting to be signed by the chairman of the meeting at which such resolutions were passed or proceedings had, or by the chairman of the next succeeding meeting, shall be received as evidence in all legal proceedings; and until the contrary is proved, every general meeting of the company or meeting of directors or managers in respect of the proceedings of which minutes have been so made shall be deemed to have been duly held and convened."

Now we have no evidence at all as to the circumstances under

which this meeting was held. We do not know, as it was proved in *Steele's Case* (1), that there had been no summons sent to those directors who were not present at that meeting, and, therefore, I think, we ought to hold, and we are bound by the Act of Parliament to hold, that in the absence of any evidence to the contrary that meeting was duly held and convened; and then, if that was so, notice must have been sent to all the directors, and those who were there at the meeting, as there was no quorum required by the articles, would be put in a position to act for and on behalf of the company. Then we have, as early as the 7th of January, a ratification by the company of the act of their invalid body of directors treating *Bosanquet* as the holder of these shares. But it does not stop there. It takes down the ratification to a little later date, namely, the 16th of January; for what we find is this, that on the 16th of January there was a meeting of all the four directors who, it is said by Mr. *Higgins*, could alone ratify the previous allotment which had not been previously ratified or adopted on behalf of the company; and then we find that Lord *Inchiquin* was the chairman of that meeting on the 16th of January. We do find in these books that he, as chairman of the succeeding meeting—that is to say, the meeting of the 16th January—did sign the minutes of the previous meeting of the 7th of January. It is very true that in the minutes of the 16th of January there is nothing said about the minutes of the last preceding meeting being read and confirmed; but we know what is the ordinary and regular course of business at meetings of this kind; that the minutes are not signed until they have been read, and that they are signed for the purpose of confirming them; and therefore as those minutes shew that these directors recognized and adopted the contract with Mr. *Bosanquet*, that if not effectually done by the meeting of the 7th of January, was ratified and made effectual by the signature given on the 16th of January by the direction of a meeting of all the directors. Therefore, I think we may consider that that meeting of the 16th of January at the latest was a ratification and adoption of the contract purporting to be made on behalf of the company by those who acted in October, and that from that time at least there

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was an effectual ratification; that is to say, an election, to put it in another way, by the company to be bound by the act of those who had acted on the 24th and 25th of October.

Then, was that too late? It is said that there had been a considerable alteration in the position and prospects of this company between the meeting of the 24th of October and that time. In my opinion, that is not brought forward in such a way as that we can attend to it. If it was intended to be relied upon it ought to have been brought forward pointedly in such a way that those who now represent the company could meet it and might have an opportunity of shewing that there was no alteration, substantially, between the state of the company in October and the state of the company in January so as to make it inequitable to ratify the previous unauthorized contract. In my opinion, therefore, although the case which is referred to—*Steele's Case* (1)—shews that the allotment made in October was not such a contract as could bind the company, the other case of *Bolton Partners* v. *Lambert* (2) shews that the ratification should go back, and that there is an effectual ratification so as to bind Mr. *Bosanquet* as well as Mr. *Badman*, and therefore, in my opinion, the appeal fails.

LINDLEY, L.J.:—

I am of the same opinion. I think this case is governed, when the facts are understood, by the case of *Bolton Partners* v. *Lambert*.

It is said first of all that the allotment which was made in fact on the 24th of October, 1888, in response to an ordinary application for shares, was altogether a nullity—it was void as distinguished from voidable. It is said to have been a nullity on two grounds: first of all, because the real contract between the parties was a personal contract and that the allotment, if any, should be made by the gentlemen whose names are on the prospectus. I cannot take that view of the contract. It is a forced view, and not a business view at all; and, having regard to the articles which refer to directors, I cannot bring myself to say that it is the true view. It is no part of the contract that the allotment, if any, should be made by some directors as distinguished from

(1) 42 Ch. D. 160. (2) 41 Ch. D. 295.

others. Then it is said that the fact that the contract was made by persons without authority makes it void. That is covered by authority; that was the very point urged in *Bolton Partners* v. *Lambert* (1); but the Court repudiated it, and said: "No, it is voidable at the option of the principal; he can avoid it if he likes—he can elect to stand upon it if he likes."

Now, looking further into the matter, one is struck by this, that there is no sign here from the beginning to the end of anything like an election by the company to avoid that allotment or to disavow the act of those who purported to be their agents. The company never take that line; on the contrary, whatever they do is consistent, and only consistent with the view that they ratified and upheld the act of those agents.

It has been said that there was no valid ratification, and it has been said that, inasmuch as the directors who ratified could not have allotted, the company could not be bound by a ratification by them. That appears to me to be a fallacy. Of course the principal cannot by his agent ratify what that agent has done; but I never heard, nor do I think it is sound law to say, that a principal cannot employ one agent to do one thing and another agent to ratify what the other has done. I think that is altogether mistaken in point of law.

Now, as to the remaining point—which is a difficult point—namely, whether there was any ratification within a reasonable time; certainly there was no repudiation, which is an important point. In *Badman's* case there was nothing like repudiation by him and no approach to it. He never repudiated his contract at all. He said, "I would rather be off it;" but the company will not let him off; and a little while after they bring an action against him for the money, which is as clear an election to abide by the allotment as anything can possibly be. It was urged by Mr. *Beaumont* that it was too late to say the allotment had been made; but it is not in the least like the cases in which there has been an application followed by the lapse of four or five months and then an allotment. It is nothing of that kind. It appears to me that *Badman's* case is utterly hopeless.

Mr. *Bosanquet's* case is a little better; but here again one

(1) 41 Ch. D. 295.

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must look closely into what passed. He never repudiated what was done until after the decision in *Steele's Case* (1), even if he did so then—as to which I will say something presently. His letter in reply to the letter of allotment was not a repudiation, but merely a complaint—what I will venture to call a growl—it was not much more. Then between that date and the 16th of January there was this very important matter. It seems that the company—who, recollect, had got his money, because he paid his £300 to the bankers—he says he paid it under protest, but that protest is not brought home to the company at all—put their seal to his certificate, and the secretary writes and tells him, "You can have your certificate in exchange for your letter of allotment"; but he will not have it. What is that except a clear and distinct and unequivocal act by the company in conformity with what they had done as adopting the allotment as a valid contract? It appears to me that after that it would have been useless for the company to say that it was competent for them to repudiate the acts of their so-called agents, or improperly appointed agents. They could not have done it.

But the case does not quite rest there, because there is some further correspondence, and afterwards, on the 7th of March, there is a formal resolution adopting in terms what had been done, not only in this case but in all other cases. At first I thought the conduct of the directors had been a little unfair; but, having regard to the sealing of the certificates and offering them to him, I do not think the ratification was too late or unfair. It appears to me, therefore, that *Bosanquet* also fails to make out that there is a defect in this ratification. It comes, therefore, to this, that there was an allotment in fact by agents who had no authority, but whose authority never was repudiated by the Appellant, and which authority has always been acted on by the principal from first to last. I think, therefore, that the appeal must be dismissed.

BOWEN, L.J.:—

I also think that this appeal must fail.

The first point which Mr. *Higgins* argued was one the answer

(1) 42 Ch. D. 160.

to which depends on the true construction of the contract. It is a question of construction. Mr. *Higgins* urged that it was a condition of this contract that the shares should only be allotted by designated persons—persons who were indicated in the prospectus as the agents of the company to allot. In the present application, the specific ground of misrepresentation is not open to him to take, because it was not taken below, and the proceeding has not been so shaped; but I agree that it does not follow necessarily that facts which amount to a misrepresentation may not give rise to relief upon another ground; and if Mr. *Higgins* could shew that the true construction of this contract was that the shares were only to be allotted by designated persons, then no doubt he would be entitled to say, if the designated persons had not allotted the shares, that there had been a failure of a condition precedent or a warranty. If the contract was one of that kind, it would be in some senses a personal contract, not a contract in which the continuing personality of the party contracted with was of the essence of the contract, but in which the personality of his agent was. It would be a peculiar kind of contract. I do not know that I can call to mind for the moment any contract which would be an illustration of the doctrine; but still, as people may contract in a free country on what terms they like, one can conceive in theory that there might be a contract of which it was a condition that the agent of the other side, and the only agent, to act should be a designated person.

But is that what this contract of allotment comes to? It certainly can only be held to be such a contract, if you read the words in the letter of application to which Mr. *Higgins* alluded,—that the applicant undertook to take the shares allotted to him on the terms of the prospectus—in the sense in which Mr. *Higgins* asked us to read it. But I think that is not the right construction. I do not think that it means that the applicant only agrees to contract on the condition that the shares are to be allotted by the particular agents who are held out in the prospectus, but that he agrees that, if the contract of allotment is made, the obligations of the parties under the contract shall be consistent with the terms of the prospectus. Therefore that ground fails.

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If it had been a good ground, I agree that it would have gone to the root of the case.

But then Mr. *Higgins* also says, assuming that in any case this was a contract of allotment made in the first instance by persons who were not the lawfully authorized agents of the company, who had no authority to bind the company, that, therefore, in the first instance the allotment was irregular and invalid, and there was no allotment at all; and, in the second place, he says that this is a case in which either there could be no ratification, or, at all events, there were circumstances which bound the company.

Now, I agree that as this is an act done professedly on behalf of the company by persons who had not in fact authority to act as agents of the company, it does require ratification by the company to make the act a good one and to make it binding; and I also think that a ratification by the company must occur within a reasonable time. I think that the principle upon which that is founded is that a ratification is really not, as I put it to counsel, an election not to avoid the contract—because original contract, from my point of view, there was none, they not having been authorized agents to make it—but an election to confirm the act which professed originally to be done by the authority of the company, although it was not; and as it is an election, it must take place within a reasonable time, and the standard of reasonableness must depend upon the circumstances of each case. I do not think it requires authority to make that clear. If authority were wanted, *Ex parte Baily* (1) would supply it; and I do think also that, among the circumstances of the case, almost the most important is the character of the personages between whom the question arises. I think that the question of reasonableness may differ if you are discussing a matter between two contracting parties, or if you are discussing a matter between a principal and his own agent. But with regard to the reasonableness of the time during which the ratification may take place, one of the strongest ways in which the counsel for the Appellants might fairly put it was this. They say the act must be ratified, in order to be binding, within the period during which the original act could lawfully itself

(1) Law Rep. 3 Ch. 592.

have been done; and for that proposition they, no doubt, relied on cases like the ordinary case of *Bird* v. *Brown* (1); and, say they, two months is an outrageous time within which to keep open the question of allotment; and they instance *Ramsgate Victoria Hotel Company* v. *Montefiore* (2)—a case in which it was held that after four or five months a person had a right to treat the matter as if the acceptance by the company had not been given or, indeed, declined. But it seems to me that the fallacy of the argument lies in this, that there is no hard-and-fast line in any case: the measure of the reasonableness of the time depends entirely upon the circumstances of the case. You cannot take a hypothetical case and say that if this had been an instance of an offer made and nothing done, with all the parties silent and the silence continuing for two or three months, then the allotment would have come too late. That is not the case here. Those are not the circumstances of the case, and you cannot take a hypothetical case which has not occurred, and, assuming that in that hypothetical case two or three months would have been too long, transfer the application of that standard to a totally different case where the circumstances are entirely different—as is this case. This is not the case of an offer, and silence following upon the offer for some time. It is a case where, it is true, there has been no valid allotment; but the parties have been acting together from first to last—or for some time, at all events—upon the faith that there had been an allotment; and, although they are at arm's length, and there has been a controversy, the facts differ totally from the cases of what I call silence, in which two months or three months might be a time beyond which the Courts would not consider the offer to be open. *Primâ facie*, of course, an offer made is a continuing offer until such time as is indicated either by the parties, or by some good reason, for closing with it or refusing it. It must be a question of fact in each case what the reasonable limit is. Mere time is nothing except with reference to the circumstances.

Now, can it be said here that the circumstances with regard even to *Badman's* case, or with regard to *Bosanquet's* case, closed the matter before the time at which the company's ratification is

(1) 4 Ex. 786. (2) Law Rep. 1 Ex. 109.

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to be assumed to have taken place? I think that the ratification in *Badman's* case was clear on the 24th of December. There was an action brought. What more do you want? The action was brought by the authority of the company. It cannot be denied that the ratification which is to be looked for is a ratification by the company or its appointed agent or agents who have authority to ratify; and an action brought by the authority of the company is the fairest and most open indication of an election to treat that which is no contract as if it had been *ab initio* a contract, and to give it vitality as from the first. Well, there was no repudiation, and the circumstances which have been pointed out by my learned brethren who preceded me prevent us from saying that the time was too long under the circumstances, and certainly we have not the materials from which we can safely come to the conclusion that there had been such an alteration in the prospects of the company as rendered it unfair that that which had been assumed to be, in the first instance, good between the parties should be made good by a subsequent option or election on the 24th of December.

With regard to *Bosanquet's* case, I take it that the real ratification was either on the 7th of January or on the 16th of January. With regard to the 7th of January, I can only say that I desire to reserve the point whether what took place on the 7th of January, praying in aid such presumption as ought to be made with regard to the irregular conduct of the business of the company, was not in itself valid. I do not dispute it, because it is not necessary to do so; but I should not like to say whether it was invalid if it stood alone. But it was made good, I think, by what took place on the 16th of January, for the reasons which Lord Justice *Cotton* has given at greater length. I only wish further to say, on this part of my judgment, that even if there had been no ratification till the 7th of March, the date at which it was assumed to have occurred in the Court below, I still, under the peculiar circumstances—and it is a question of circumstances—doubt, even then, whether the ratification has come too late.

Then a further ingenious point was taken by Mr. *Higgins* and by Mr. *Farwell*, which was something to this effect. They said:

"The ratification when it was made was not made by a person who could have done the original act." There is a fallacy in that way of stating the question. The ratification when made was made by the company—not by the agents of the company. It was through the agents of the company and by means of the agents of the company; but the act itself was the act of the company if it was a good act in law; and the moment you resolve the arguments into its elements, that moment you see where the fallacy lurks. They require, in order to make the argument good, to express themselves as if the act of ratification was the act of the agent and not the act of the principal by his agent, and then the argument falls to the ground—unless, indeed, it can be said that it is a principle of law that a person cannot ratify an act done without authority, although professing to be done on his behalf, except by an agent clothed with the same measure of authority as would have been required to do the original act. But there is no such law. How can there be such a law? You must look to see whether the agent is clothed with authority to do the act he is doing, not whether he would have been clothed with authority to do some other act; and, the only act which we are driven to consider in the last instance being an act of ratification, the question we have to ask ourselves is whether the person who purported to ratify on behalf of the company had really authority to ratify. The validity of his ratification does not depend upon any supposed authority in the original agent. That is not the basis of the law of ratification, because supposed authority in the original agent there is none. It is of the very essence of the idea that there was no authority in the original agent. Therefore you cannot measure the authority of the ratifying agent by any supposed authority in the person who originally was not an agent. These last observations do not, it is true, apply to the action brought or to the ratification in *Badman's* case, because there the ratification was by bringing an action which the company brought by properly appointed agents, or, at least, they do not apply so obviously to it, but they apply to the observations made about the board which ultimately ratified what was originally done. It seems to me, that as soon as one applies one's mind to dissect the ingenious argument which has

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been addressed to us, the light breaks through and makes the case perfectly plain. I think that the appeal ought to fail, with the usual result.

Solicitors for *Badman: Munns & Longden.*
Solicitors for *Bosanquet: Stretton, Hilliard, Dale, & Newman.*
Solicitors for the company: *Burn & Berridge.*

M. W.

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[1889 C. 67.]

Creditor's Deed—Resulting Trust.

The partners in a business, by a deed reciting the inability of the firm to pay their creditors in full, assigned the business and the property of the firm to trustees upon trust, that they should at their discretion either carry on the business so long as they should think fit, or sell and dispose of the business and assets, and should by and out of the profits of the said business, if carried on, and out of the moneys to arise from the conversion of the property, pay the costs and expenses therein mentioned, "and do and shall pay and divide the clear residue of the said profits and moneys unto and among all and singular the creditors of the said firm in rateable proportions according to the amount of their several and respective debts, subject nevertheless to the covenants and provisions hereinafter contained." The deed gave the trustees power to pay in full or make arrangements with any creditors whose debts were under £30. The creditors, in consideration of the assignment, released the assignors from all claims in respect of the partnership. The assignors, after some years, sued the trustees for an account and to have a sale of the business set aside as improperly effected:—

Held (reversing the decision of *Kekewich*, J.), that, although the deed contained no ultimate declaration of trust for the assignors in case the property was more than enough for payment of the debts, still, the object being the payment of debts, the transaction did not amount to a sale of the assets to the creditors, or an acceptance of the assets by them in accord and satisfaction; but there was a resulting trust of any surplus in favour of the assignors, who therefore could maintain a suit of this description.

BY indenture dated the 29th of December, 1876, between *Henry Cooke* and *Joseph Cooke* of the first part, *Rachel Swinnerton* of the second part, *Smith* and *Storey* of the third part, and "the several other persons whose names are hereunto subscribed and set, being severally creditors in their own right or in partnership,

or being agents or attorneys of creditors of the partnership lately subsisting between the said *H. Cooke* and *J. Cooke*, and *J. W. Swinnerton*, deceased," of the fourth part, after recitals to the effect that *H. Cooke*, *J. Cooke*, and *J. W. Swinnerton* lately carried on business at *Barrow* as ironmasters, and that *Swinnerton* died on the 15th of May, 1876, leaving a will which was proved in June, 1876, by *Rachel Swinnerton* alone, the other two executors having renounced, and that the parties of the fourth part or their respective principals were creditors of the firm for the sums of money set opposite their respective names in the schedule. "And whereas the said firm being unable to pay their creditors in full, an agreement was in process of arrangement at the time of the decease of the said *J. W. Swinnerton* for the making of an assignment similar to that hereinafter contained, and for the granting of a release to the said firm similar to that hereinafter contained," and reciting that *Rachel Swinnerton*, as executrix, approved of the proposed assignment and release, and had agreed to concur in the deed in manner thereinafter contained, *H. Cooke*, *J. Cooke*, and *Rachel Swinnerton* as executrix, according to their respective estates and interests assigned to *Smith* and *Storey*, their executors, administrators, and assigns, the business of the firm of *Cookes & Swinnerton*, and all the property of the firm, to hold the premises to *Smith* and *Storey*, their executors, administrators, and assigns, upon trust that they or the survivor of them, his executors or administrators, should at their or his discretion either carry on the business so long as they or he should think fit, or should, either immediately or at any time after ceasing to carry on the business, sell and dispose of the business and the other premises thereby assigned in such manner as they or he should think meet, "and do and shall by and out of the profits of the said business, if carried on, and out of the moneys to arise from such taking possession, calling in, collecting, compelling payment, receiving, sale, disposition and conversion into money as aforesaid, pay the costs, charges, and expenses of preparing, engrossing, and executing these presents, and of such taking possession, calling in, collection, compelling payment, receiving, sale, disposition and conversion into money as aforesaid, and all other the costs, charges, or expenses to be incurred or become payable in or about the execution

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of the trusts of these presents, or in respect of the premises, and do and shall pay and divide the clear residue of the said profits and moneys unto and among all and singular the creditors of the said firm, in rateable proportions, according to the amount of their several and respective debts, subject nevertheless to the covenants and provisions hereinafter contained." The assignors then appointed *Smith* and *Storey*, their executors and administrators, to be the attorneys of the firm and of the parties of the first and second parts, to recover and give receipts for all moneys and assets of the firm, and to commence and carry on or discontinue or compromise any action or proceeding for recovery of the assets. "And it is hereby declared that it shall be lawful for the said *J. T. Smith* and *T. Storey*, their executors or administrators, to pay in full or make such arrangements with the creditors whose debts are under £30, or any of them, as they may think fit." And in consideration of the above assignment the parties of the fourth part released the *Cookes* and *Rachel Swinnerton* and the estate of *J. W. Swinnerton* from all claims in respect of the partnership.

This deed bore a ten-shilling stamp, and was executed by nineteen creditors, whose debts amounted in the whole to £33,682. Four of the debts were under £30: one, due to the *Barrow Hæmatite Company*, was over £16,000, and another over £13,000, and only one other exceeded £1000.

The trustees continued the business for some years under the deed.

This action was commenced in December, 1889, by *H. Cooke* and *Rachel Swinnerton* against *Smith* and *Storey*, the *Barrow Hæmatite Steel Company* and *Joseph Cooke*, alleging misapplication of the assets, asking an account against *Smith* and *Storey*, and seeking to impeach a sale made by them to the *Hæmatite Company* in 1885 of a large part of the assets.

On the 14th of March, 1890, Mr. Justice *Kekewich*, on the application of *Smith* and the *Hæmatite Company*, made an order that the preliminary question of law, whether on the true construction of the creditor's deed the Plaintiffs had any title to maintain the action, should be determined before any evidence was given or any question or issue of fact was tried.

The preliminary question came on for argument before Mr. Justice *Kekewich* on the 25th of March, 1890.

Renshaw, Q.C., and *Farwell*, for the Defendants:—

The Plaintiffs have no claim or title whatever. The assignment is not on trust to pay the debts, but is an absolute assignment to *Smith* and *Storey* for the creditors. It was a bargain: the creditors took the property, and the partners got a release from their liabilities.

Solomon and *Sanderson*, for a Defendant in the same interest.

Millar, Q.C., and *T. E. Mansfield*, for the Plaintiffs:—

Although the deed is not drawn with accuracy, the intention is clear, that if there was more than enough to pay the creditors there should be a resulting trust for the partners. The parties, no doubt, did not contemplate that there would be more than enough to pay the creditors, and made no provision for that case; but the law will supply the omission. The sole object of the deed was the payment of the creditors, and when that has been done the deed is at an end and the estate reverts. It cannot be that either the creditors or the trustees are to take the surplus, and yet that must be so if there is no resulting trust. Could the trustees or the *Barrow Company* have made a composition with the other creditors and then taken the property? This was simply a deed to provide for the payment of the debts to the creditors; and are the creditors to receive 40*s.* in the pound, or even more?

KEKEWICH, J.:—

In this case the Plaintiffs put their claim on the strongest possible ground—that of a resulting trust. I cannot find the resulting trust.

As a rule, you find a resulting trust in two classes of cases; one where an express trust is declared, and that express trust does not exhaust all the beneficial interest in the property, the subject of the trust; the other, where the Court, applying some rule or principle of equity, implies a trust which is not expressed—that is to say, implies a trust in the assignee or holder of the

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property, and declares that he is not entitled for his own benefit; and then, finding that there is no trust declared, is obliged to look back and create, by the application of the doctrines of equity, a resulting trust.

Neither of those events has happened here. You have an express trust declared, and to my mind that express trust exhausts everything. There is nothing left on which the doctrine of resulting trust can operate. I have been asked to look at what happened after the execution of the deed. But I do not think that I am at liberty to do that, because the form of the order tells me only to decide whether, on the true construction of the deed, the Plaintiffs have a right to sue. But it may be convenient after the argument to say that the circumstances which occurred in this case—of the business being carried on in the same manner, and in the same names, after as before the execution of the deed—are by no means an uncommon occurrence, and I think do not point to any such conclusion as I am asked to draw therefrom on behalf of the Plaintiffs.

Turning then to the deed, the construction which I am asked by the Plaintiffs to put upon it is, that there is no conclusion upon the face of the deed—no assumption that the creditors will not be paid in full. The answer to that is, that what happens hereafter is no part of the deed at all. The deed neither contemplates 20*s.* in the pound at any time thereafter, nor less nor more. What it does contemplate, and what it does state in fact, and what is the root of the whole matter, is, that the debtors at that time (on the 29th of December, 1876) were unable to pay in full. What would happen afterwards was a matter of probability with which the parties were not concerned. Beyond that mere recital there is nothing to guide me; and the operative part comes simply to this—that the creditors say: "You, the debtors, cannot now, as you admit, pay us in full; you have certain property which is worth something, and we will take that and give you a release. Whether we could or could not get more by forcing you into the Bankruptcy Court, we do not stop to inquire. You give us all this property—give it to trustees for us—and then we will give you an absolute release, and take our chance." That is what many a creditor has done before, and

probably many a creditor will do again. The trust is, that the trustees are to "pay and divide the residue of the said profits and moneys"—not towards the satisfaction of the creditors named in the schedule according to the amounts set opposite their respective names, and so forth, which is a very common form, but to pay and divide them "unto and among all and singular the creditors of the said firm in rateable proportions according to the amount of their several and respective debts."

Before going back to that, I will deal with the concluding words—"subject, nevertheless, to the covenants and provisions hereinafter contained." There are two provisions which possibly might interfere with that distribution—the one which enables the trustees to pay creditors for under £30 in full, and the other by which they are enabled to pay the receipts, when they come to £50, into the bank. That is to say, notwithstanding the absolute equality of distribution, they may pay the small creditors in full at once, and, notwithstanding the same provision for distribution, they may pay the money into the bank named, so as to prevent the creditors asserting a right to have every sovereign divided between them.

But the profits and moneys are to be paid in that way among them, and it is quite possible that they may receive more than 20*s.* in the pound, though I observe no allegation in the statement of claim that they have been or are likely to be paid more. The Plaintiffs are now willing apparently to get back their property on the terms of payment; but there is no statement in the statement of claim that there is sufficient now in the property to pay all that is due from them, still less that the creditors have been paid; and one creditor—the largest—has certainly not been paid. But I am told here that they may be paid 40*s.* in the pound. That is not the result at which the Court would wish easily to arrive. There seems to me to be a complete answer to that. This deed was executed in December, 1876; and not until thirteen years afterwards do the Plaintiffs find that it would be better for them to have the property back. A very little arithmetic would tell me that in thirteen years the interest on these sums would be considerable; and if creditors are obliged to go without their debts for thirteen years, they would not be

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paid very much in excess of what is due to them if they were paid 40*s.* in the pound. That may probably have entered into the calculations of the parties, with the possibility of the reviving of trade, and so forth. They made that bargain, they clearly expressed it, and I find no reason to go back from it.

I must find, on the preliminary question of law, that on the true construction of the deed the Plaintiffs have no title to maintain this action. The costs of all parties will be costs in the action. Practically this decides the case, unless the parties wish to keep it up.

C. M.

C. A.

The Plaintiffs appealed. The appeal was heard on the 13th of June, 1890.

Neville, Q.C., and *T. E. Mansfield*, for the Appellants:—

To ascertain whether there is a resulting trust for the benefit of the assignors, the whole scope of the deed must be looked to. It is a deed for the benefit of creditors, and the presumption is that it was intended to pay their debts and nothing more; unless there is something in the frame of the deed to shew affirmatively that the intention was for the creditors to take the assets out and out in satisfaction of their debts, this presumption is not rebutted, and a resulting trust of any surplus arises. The provision as to creditors under £30 supports the view that payment of debts only was intended; for it is not likely that a discretion should be given to the trustees to decide whether creditors under £30 should be paid in full or take their share of the assets, however valuable they might turn out to be. The words of distribution must be taken as meaning that the trustees should divide rateably, according to the amount of the debts, so long as there were any debts, *i.e.*, until the debts had been paid in full. When the debts are wiped out, the basis of the distribution is gone. Nobody contemplated a surplus, and the parties did not intend to dispose of it by this deed.

Renshaw, Q.C., and *Farwell*, for *Smith* and the *Hæmatite Company*:—

The bargain on the terms of the deed is plain. It is not said

that the moneys are to be applied in payment of the debts, but that they are to be distributed among the creditors in proportion to their debts; they were to take the assets in satisfaction of their debts; so the assignors retained no interest and cannot sue.

[BOWEN, L.J.:—Does not the recital that the assignors were unable to pay their debts throw light on the object of the deed?]

It is not a recital that the assignors cannot pay, but that at a past day they could not pay, and therefore during *Swinnerton's* life an arrangement to this effect was entered into. It was inserted to justify his executrix in entering into the arrangement. There is not a word in the deed assimilating the administration to that in bankruptcy, and the partners do not assign their separate estates.

[FRY, L.J.:—What occasion is there for a release by the creditors if the transaction was a sale?]

A conveyancer would insert a release as furnishing the most convenient defence if a creditor were afterwards to sue.

[FRY, L.J.:—This deed is substantially the same as the deed for the benefit of creditors in *Martin's* Conveyancing, by *Davidson* (1), also given in *Forsyth* on Composition with Creditors (2).]

It has never been decided that there was any resulting trust under a deed in that form. The next precedent contains a declaration of trust of the surplus.

[FRY, L.J.:—Suppose the trustees pay a creditor under £30 in full, does he remain a *cestui que trust*?]

Probably not, as he accepts payment in full to the prejudice of the other creditors.

[FRY, L.J.:—It does not appear that he has any option to refuse to accept it.]

We submit that there is nothing to compel him to accept it—the power merely justifies the trustees in paying.

It was competent to the creditors to accept the assets in

(1) 1st Ed. vol. v., p. 440. (2) 3rd Ed. p. 230.

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satisfaction of their debts, and unless the words are to be strained, it must be held that they have done so.

Solomon and *Sanderson*, for *Storey*.

COTTON, L.J. :—

Although the deed in this case follows the exact terms of a precedent in Mr. *Davidson's* book, I cannot say that it does not omit something which had better have been inserted. There is no express trust of any surplus after the debts are paid in full, and the question is whether any trust of it is to be implied. In my opinion, the object of this deed was to provide for payment, either in full or so far as the estate would extend, of the creditors of the firm. The parties did not contemplate there being a surplus, or else, I suppose, they would have provided for it. When all the creditors are paid in full, is there a trust for the assignors? In my opinion, there is. It is true that there is no trust of the surplus expressed in the deed; but when property belongs to people who are indebted, and they assign it for the purpose of paying their creditors, if those creditors are paid, then, in my opinion, there is a resulting trust. There are expressions here which give rise to a good deal of argument; but if we look upon this as a deed for payment of creditors, as I say it is to be looked upon, then, if those creditors are paid in full, there will be a resulting trust for those who owned the property before they executed the deed. It is said that when this deed was executed by the *Cookes*, and had been assented to by the creditors, the *Cookes* had no longer any interest in this property, that the trustees were trustees only for the creditors, and that if the *Cookes* by good fortune got the means of paying off all the creditors, they could not have said, "Here, take all the money that is due to you, and let your trustees reassign to us the property which has been assigned to them." It is true that here there is a direction (a direction which was said to cover everything, and to exclude the *Cookes* from any interest) to divide all the profits and the proceeds of sale amongst the creditors in proportion to the amounts of their respective debts. But that to my mind means only that they are to be paid in proportion to the sums

due and owing to them, so long as their debts are not paid in full. There is no direction as to what is to be done with any surplus when they have been paid in full; but, in my opinion, that surplus must go back to those who had been debtors and who had been released in consideration of the assignment which they made. It is true that no clause was put in, saying that after payment of all the creditors in full the surplus should go to the *Cookes*; but, in my opinion, no such clause was necessary, because it appears to me clear that the object intended to be provided for by this deed was payment or satisfaction of the debts due by the *Cookes*, and when that is done any surplus remaining must go back to the *Cookes*, from whom it came. I differ from Mr. Justice *Kekewich*, but I do not myself feel any doubt on the subject.

BOWEN, L.J.:—

I am of the same opinion. Had it not been for the judgment of Mr. Justice *Kekewich*, whose experience I respect, I also should have said that I have no doubt on the subject, although the deed does not contain words which would have prevented the question arising. In order to construe the clause, the construction of which is the matter for our decision, we must consider what is the object of this deed. Is it the true object of this deed to pay the debts of the assignors and devote so much of the property of the assignors to that purpose as would be necessary—in which case, as soon as the object is satisfied, there would be a resulting trust to the assignors—or is the true object of the deed, as the Respondent contends and as the learned Judge appears to have thought, that the assignors should part out and out with their property, and as a consideration get rid at the same time of their debts? Those are the two alternative views. We start with this, that the deed is a deed which contains a schedule of the various creditors to whom or for the benefit of whom the assignment is made, and when we look at the schedule we find it contains the names of nineteen people or firms, four of whom had debts under £30; then there were seven or eight with debts of considerable amount, the *Barrow Hæmatite Steel Company, Limited*, and the *Lancashire Banking Company*, being by far the largest creditors. The first recital upon which stress, I think, ought to be laid, is a recital as

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to the inability of the firm to pay their creditors in full; for although it is only a recital that the firm some months before were unable to pay their creditors in full, one can hardly read it without deriving from it the conviction that all the parties to this deed, at the time the deed was made, regarded the assignors as unable to meet their engagements. Then comes the clause we have to construe. After assigning the business to the trustees on trust at their discretion, either to carry on the business, or to sell immediately or at any time afterwards, and after paying out of the profits of the business carried on and out of the moneys to arise from taking possession, and sale if sold, and all other costs, charges, and expenses to be incurred or become payable in or about the execution of these trusts, there is a provision that the trustees shall pay and divide the clear residue of the profits and moneys unto and among all and similar the creditors of the said firm in rateable proportions, according to the amount of their several and respective debts, subject nevertheless to the covenants and provisions thereinafter contained. I think it is doing no violence to the deed to read that clause by the light of the previous recital as to the inability of the firm to pay its debts, and I think that the direction to divide in rateable proportions, according to the amount of their several and respective debts, without any disposition of the possible surplus, is to be accounted for by the fact that it was supposed that the property would not be enough to satisfy the claims of the creditors in full.

Then comes a further clause, which I think is also material—a clause which gives the trustees the power at their own discretion to pay in full or compromise with the creditors whose claims are under £30. If the true effect of this deed is that the entire property was to pass to and vest for ever in trustees for the benefit of the creditors whose names are scheduled, it seems to me almost incomprehensible that the deed should contain a provision which gave the trustees the power at their discretion to pay off debts under £30. The truth is, that there is nothing at all in this deed inconsistent with the idea that its object is only to pay the debts and to divide so much of the property of the assignors as might be necessary for that purpose, unless it be the absence of any express direction as to what is to be done with the

surplus, and the language of the direction as to division, which I think is fully accounted for by the state of circumstances at the time when the deed was made. I cannot help feeling that when you see a number of creditors scheduled who at the date of the deed are carrying on every kind of business, and who together constitute a multifarious group, it is far more reasonable to think that the deed was intended to protect them and devote so much of the property as was necessary to pay their debts, than to assume they were buying a business and intended through the medium of their trustees to embark in a new venture. Reading this deed by one's ordinary natural lights, I cannot doubt that it was simply intended to be an assignment for payment of debts, and that there was implied in it a resulting trust to the assignors when the debts were fully paid.

FRY, L.J.:—

The question which we have to decide in this case is, what is the true nature of this deed. Is it a deed by which a firm and their creditors agreed upon a certain mode of satisfying the debts and nothing more—in which case there would plainly be a resulting trust for the benefit of the assignors—or is it a deed by which the firm sold their business to their creditors, or a deed by which they agreed to give up their business by way of satisfaction and accord to their creditors, in either of which two cases it is of course plain that the creditors, and they alone, are the owners of the business? Now I have no hesitation in coming to the conclusion that the deed is of the first of these descriptions—that it is what is commonly understood by "a creditors' deed," that is, a deed by which the creditors either extinguish or suspend their rights as creditors in consideration of certain provisions to be made for the payment of their debts.

We begin with this, that the deed throughout describes the persons who are parties of the fourth part as being creditors of the firm, and we find the usual recital of the inability of the firm to pay them. We find no recital indicating an intention to sell the business; we find no recital indicating any intention to give up all interest in the business to the creditors by way of accord and satisfaction of their debts; but we find an assignment

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in the usual terms. Then come the words of declaration of trust, which no doubt are not very felicitous, and which would create some doubt if they stood by themselves. The trustees "shall pay and divide the clear residue of the said profits and moneys unto and among all and singular the creditors of the said firm in rateable proportions according to the amount of their several and respective debts, subject nevertheless to the covenants and provisions hereinafter contained." Now, I think it is not doing any undue violence to the language to hold that the words, "according to the amount of their several and respective debts," have a double function—that they describe the ratio in which the division is to take place, and that they also determine the limit to which the payment is to be made. In other words, a person is not paid according to the amount of his debt if he receives more than the debt. That meaning, I think, may fairly be put upon those words to give effect to what in my judgment is the plain and obvious intention of the deed.

Then comes the clause with regard to the payment of creditors under £30, which I think is very important. It gives the trustees absolute right and power to pay all the creditors under £30. Does such a payment leave a creditor under £30 still a *cestui que trust* under the deed? If not, it is remarkable that these creditors being, according to the view of the Respondents, purchasers of the business, may at the will and discretion of their own trustees be excluded from their share in the business, even although it is turning out a flourishing concern. That is a possible arrangement; but it is a highly improbable one. I think, therefore, that the true meaning of the deed is that it is only a deed to provide for payment of the debts, and consequently that there is a resulting trust, and that we ought to remit the matter to the Judge, with a declaration that, according to the true construction of the deed, a trust resulted to the assignors after payment in full of the creditors.

Solicitors for Plaintiffs: *Trass & Jarmain*, agents for *F. Taylor, Barrow.*

Solicitors for Defendants: *Currey, Holland, & Currey; Redpath & Co.*, agents for *C. F. Preston, Barrow.*

H. C. J.

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1890
June 21; July 2.

In re PARSONS. STOCKLEY *v* PARSONS.

[1890 P. 956.)

Married Women's Property Act, 1882 (45 & 46 *Vict. c.* 75), *s.* 5—*Contingent Title—Spes successionis—Nemo est hæres viventis—Contingent Interest or mere Expectancy—Gift to possible Next of Kin of a Person who is supposed Die at a future Time.*

A *spes successionis* is not a title to property by English law. A woman, married before the *Married Women's Property Act*, 1882, who has a mere *spes successionis* to property, as one of a class of possible next of kin, has not a "contingent title" within the meaning of sect. 5 of that Act.

A testator, who died in 1879, bequeathed a sum of money to trustees, upon certain trusts, and subject thereto in trust for "such person or persons as at the time of the failure of the preceding trusts would be my next of kin, and entitled to my personal estate under the statutes for the distribution of the personal estates of intestates, if I had then died intestate." The preceding trusts failed on the 21st of May, 1886. A woman, married in 1857, was one of the persons who would have been next of kin of the testator if he had died on the 21st of May, 1886. She made a will, dated in 1889, and died in the same year, leaving her husband surviving:—

Held, that the property of the married woman under the gift in favour of the testator's next of kin first accrued to her in title and interest on the 21st of May, 1886, and that, therefore, under sect. 5 of the *Married Women's Property Act*, 1882, she was entitled to it for her separate use, and it passed under her will.

In re Beaupré's Trusts (1) discussed and dissented from.

The difference in legal effect between a gift to the "children" or "nephews," or "kindred" of *A.* who shall be living at his death, and a gift to the persons who shall then be his statutory next of kin, considered and explained.

JOHN STOCKLEY, by his will, dated in February, 1877, left £1600 to trustees, upon trust for his daughter, *Eliza Bird*, for life, and after her death for her husband, if any, for life, and subject thereto for her children and issue, and the testator then continued as follows:—

"And if there shall be no child or other issue of my said daughter who shall attain a vested interest in the said trust moneys, funds, and securities, then the same shall be in trust for

(1) 21 L. R. Ir. 397.

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such person or persons as at the time of the failure of the preceding trusts would be my next of kin, and entitled to my personal estate under the statutes for the distribution of the personal estates of intestates, if I had then died intestate, and in the proportions in which they would be so entitled."

John Stockley died on the 12th of July, 1879. *Eliza Bird* died on the 21st of May, 1886, without leaving any husband or having had any issue.

Elizabeth Parsons would have been one of the next of kin of *John Stockley*, if he had died on the 21st of May, 1886, and entitled, if he had then died intestate, to one-third of his personal estate under the *Statutes of Distribution.*

Elizabeth Parsons was married to *John E. Parsons* in 1857. Without the knowledge of her husband, she made a will, dated the 5th of August, 1889, whereby she gave all her property whatsoever and wheresoever to her two nephews, *J. H. Ward* and *W. S. Ward*, and appointed the Plaintiff sole executor. She died on the 10th of September, 1889, and on the 19th of March, 1890, probate of the will was granted to the Plaintiff in general form, according to the practice introduced by the Probate Rules of March, 1887, rr. 15 and 18.

An originating summons was taken out by the Plaintiff against the husband and nephews of *Elizabeth Parsons*, asking for the decision of the Court whether the one-third of the legacy of £1600 bequeathed by the will of *John Stockley*, to which *Elizabeth Parsons* was entitled at the time of her death, formed part of her estate which was disposed of by her will, and to which the Defendants, *J. H. Ward* and *W. S. Ward*, were entitled by virtue of her will, or whether the Defendant, *J. E. Parsons*, was entitled to such one-third share by virtue of his marital right.

Townsend, for the Plaintiff, stated the case, and submitted that the question could be determined on originating summons, the husband not objecting.

[KAY, J., referred to *In re Hargreaves* (1), and said that the fund being in the hands of the executor, who did not know what to do with it, the application might be entertained.]

(1) 43 Ch. D. 401.

Ingle Joyce, for the husband:—

Mrs. *Parsons* had a "contingent title" to this money before the commencement of the *Married Women's Property Act*, 1882, and the right of her husband is, therefore, preserved by the provisions of sect. 5 of the Act, as interpreted by the Court of Appeal in *Reid* v. *Reid* (1). The exact point has in fact been decided in *Ireland* by the Court of Appeal, affirming a previous decision of the Master of the Rolls, in *In re Beaupré's Trusts* (2) That case is not distinguishable from the present one. From the death of the testator, *John Stockley*, in 1879, until that of *Eliza Bird*, on the 21st of May, 1886, the next of kin of the testator were contingently entitled to the £1600.

[KAY, J.:—It has been decided in many cases that possible next of kin have no interest in law. This is a gift to an artificial class, no single member of which can be ascertained until the supposed event takes place.]

No doubt the class cannot be indefeasibly ascertained. One of them might die and his children come in in his stead. But they are ascertained at the testator's death as his presumptive next of kin, and at that date there is a contingent interest in each member of the class so ascertained. Although according to the modern practice (see *In the Goods of Amelia Price* (3)) probate of the will of Mrs. *Parsons* has been granted to the Plaintiff in general form, yet as the will was not assented to by her husband with full knowledge of its contents, it is inoperative as against his marital right, and his title is paramount to that of the Plaintiff as executor: *Willock* v. *Noble* (4); *Smart* v. *Tranter* (5).

Upjohn, for the Defendants claiming under the will of Mrs. *Parsons*:—

Previously to the 21st of May, 1886, Mrs. *Parsons* had no right or interest in the fund in question, but only a mere expectancy. Consequently no "title" accrued to her until after the

(1) 31 Ch. D. 402.
(2) 21 L. R. Ir. 397.
(3) 12 P. D. 137.
(4) Law Rep. 7 H. L. 580.
(5) 43 Ch. D. 587.

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commencement of the *Married Women's Property Act*, 1882, and the property was therefore her separate property and passed under her will. *Clowes* v. *Hilliard* (1) shews that a person having such an expectancy cannot even maintain an action to protect the fund, though a very remote interest has been deemed sufficient to entitle a person so to sue.

[KAY, J., referred to *Joel* v. *Mills* (2).]

Lord Dursley v. *Fitzhardinge* (3), citing *Smith* v. *Attorney-General* (4), is an authority that the next of kin of a lunatic, even though he has made no will and his recovery is hopeless, have no interest whatever in his property. On the same principle, in *Meek* v. *Kettlewell* (5), it was held that an assignment by deed of the mere expectancy of one of a class of next of kin was only a contract, and, being voluntary, not enforceable in equity. To the like effect is *Carleton* v. *Leighton* (6). The decision in *In re Beaupré's Trusts* (7) is not binding on this Court, and the attention of the learned judges in that case was not called to the line of English authorities.

[He referred also to *Kekewich* v. *Manning* (8); *In re Tucker* (9); *In re Hobson* (10); *Baynton* v. *Collins* (11); and *In re Thompson and Curzon* (12).

Townsend referred to *In re Cuno* (13).]

Ingle Joyce, in reply:—

Clowes v. *Hilliard* was a startling decision. The reasoning in that case would apply to a gift to such of the nephews of *A.* as should be living at a certain time—a gift which clearly confers a contingent interest. In the present case the title arises under an effectual instrument, and not merely by operation of law. I is impossible to distinguish the Irish case.

(1) 4 Ch. D. 413.
(2) 3 K. & J. 458.
(3) 6 Ves. 251, 260.
(4) Cited 6 Ves. 260; 15 Ves. 133, 136.
(5) 1 Ha. 464; 1 Ph. 342.
(6) 3 Mer. 667, 671.
(7) 21 L. R. Ir. 397.
(8) 1 D. M. & G. 176.
(9) 52 L. T. (N.S.) 923; 54 L. J. (Ch.) 874.
(10) 34 W. R. 195.
(11) 27 Ch. D. 604.
(12) 29 Ch. D. 177.
(13) 43 Ch. D. 12.

[KAY, J.:—The *Married Women's Property Act* was intended to have a wide operation, and the decision in the Irish case tends to narrow its operation.]

So then also did the decision of the Court of Appeal in *Reid* v. *Reid* (1).

July 2. KAY, J.:—

In this case an originating summons has been taken out by the executor of the will of *Elizabeth Parsons*, asking for the decision of the Court whether one-third of a legacy of £1600, to which the testatrix was entitled under the will of *John Stockley*, was disposed of by the will of Mrs. *Parsons* or belongs to her husband in his marital right.

[His Lordship then stated the facts of the case, and continued:—] *Elizabeth Parsons* was therefore married before the passing of the *Married Women's Property Act*, 1882, and sect. 5 would make the interest which she took after the passing of that Act as one of the next of kin of *John Stockley*, supposing him to have died at the same time as *Eliza Bird* in May, 1886, her separate property, unless she had a "contingent title" to it before the passing of the Act.

The question is whether she had then a contingent title.

It is indisputable law that no one can have any estate or interest, at law or in equity, contingent or other, in the property of a living person to which he hopes to succeed as heir at law or next of kin of such living person. During the life of such person no one can have more than a *spes successionis*, an expectation or hope of succeeding to his property.

The law is the same where there is a limitation by will or settlement of real or personal property to the heir or statutory next of kin of a living person. During his life no one can say, "I have a contingent estate or interest as possible heir or next of kin;" just as in the first case no one can have more than an expectation or hope of being heir or next of kin.

It makes no difference that the limitation is not to the actual heir or next of kin, but to the persons who would be heir or next

(1) 31 Ch. D. 402.

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of kin if the ancestor were to die at some future time. Until that time arrives there is no one who can say he has anything beyond a hope or expectation.

For this reason in a suit to administer the estate you could not make such possible heir or next of kin a party, nor is there any case in which he has been allowed to sue to protect the estate, or has been recognised as having an interest, except that in proceedings in lunacy against the ancestor he is permitted to be before the Court. The reason for that is thus stated by Lord *Eldon* in *Ex parte Clarke* (1): "The principle which leads the Court to call for the next of kin and the heir at law of lunatics, is to receive from the persons probably entitled, that assistance in the protection of the property which persons having such expectant rights will be likely to afford; but the inquiry is not considered to be binding."

The object of the *Married Women's Property Act*, 1882, was to benefit women who had married before the passing of the Act by giving them a separate estate in property to which they might become entitled during the coverture after the passing of the Act. It excepts all property their "title to which whether vested or contingent" accrued before the Act. To give a wide meaning to "contingent title" would narrow the operation of the statute. But without straining the words in either direction, can a possible next of kin of a person who is to be supposed to die at a future time be said to have a "contingent title," or is not the proper view that he has no title at all, nothing but an expectation or hope which is not recognised in law as any title? While the *propositus* is living every relative he has in the world is a possible next of kin. Can each one say that he has a contingent title? He may have sons, brothers, and nephews. Can the nephew, living the sons and brothers, say, "I have a 'title'"? If he cannot, then the brother cannot, nor the son. A *spes successionis* is not a title to property by English law. Why should this meaning be given to it in the statute in order to deprive a married woman of her right to separate property? I suppose the object of excepting a title accrued before the Act was in order not to take from the husband any advantage which he might

(1) Jac. 589, 595.

then have. Possibly the exception goes further than is necessary for this purpose; but if that is its main object, it would be contrary to the spirit of the enactment to construe the words so as to include an expectation of the wife in which the husband could not have any interest.

Now let me see how far this view of the law is supported by authority. In a note at p. 219 of the 8th edition of *Watkins* on Conveyancing, it is said in effect that there are two classes of possibilities—namely, possibilities coupled with an interest "such as contingent remainders, executory devises, springing or shifting uses; the other bare or naked possibilities, such as the hope of inheritance entertained by the heir. . . . The former class may, perhaps with more propriety, be denominated contingent interests, and the latter mere expectancies; for a possibility coupled with an interest is more than a possibility—it is a present interest, and may be devised: *Perry* v. *Phelips* (1). On the other hand, the expectancy of an heir apparent, during the life-time of his ancestor, is less than a possibility, being but a mere hope or anticipation."

The statute 8 & 9 Vict. c. 106, s. 6, made a possibility coupled with an interest assignable at law, but not a mere possibility.

In *Smith* v. *Attorney-General* (2), it was decided that an heir apparent, during the life of his ancestor, though the ancestor is a lunatic who cannot recover, could not have a bill to perpetuate testimony in order to prove that he was heir apparent, and could not, as the *verus hæres* might, have the writ *de ventre inspiciendo*.

In *Lord Dursley* v. *Fitzhardinge* (3), Lord *Eldon* said: "The case of *Smith* v. *Attorney-General* went upon this; that the next of kin of the lunatic had no interest whatever in the property. Put the case as high as possible; that the lunatic is intestate; that he is in the most hopeless state, a moral and a physical impossibility, though the Law would not so regard it, that he should ever recover, even if he was *in articulo mortis*, and the bill was filed at that instant, the plaintiff could not qualify himself as having any interest in the subject of the suit. The case of an heir apparent was very properly put by Lord

(1) 17 Ves. 173, 182. (2) Cited 6 Ves. 260; 15 Ves. 133, 136.
(3) 6 Ves. 251, 260.

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Chief Justice *De Grey* in his most luminous judgment. Upon that occasion he said, he never liked equity so well as when it was like law. The day before, I heard Lord *Mansfield* say, he never liked law so well as when it was like equity; remarkable sayings of those two great men, which made a strong impression on my memory. Lord Chief Justice *De Grey* said, that at law the heir apparent cannot have the writ *de ventre inspiciendo* in the life of his ancestor; as for that purpose he must be *verus hæres*. If the ancestor was in a fever, a delirium, having made no will, and it was not possible for him to recover, still the law would look upon him as a mere heir apparent, having nothing but an expectation, which is different from an expectancy in the legal sense, and as having no interest whatever upon that ground. In *Smith* v. *Attorney-General* (1) it was held, that the bill would not lie. It is not to be taken upon the single *dictum* of any of the learned judges, who assisted upon that occasion: but the whole judgment went upon distinguishing between that expectation, which the next of kin have in that case, and any sort of right, which the law allows to be an interest. A contingent interest is not the less a present interest. It was not doubted in that judgment, that a vested interest, though in possibility the least valuable that could be conceived, is yet of some value in consideration of Law; and gives a right to preserve testimony. In the course of that cause cases were cited, which go to this, that though the next of kin could not file a bill, or the heir apparent in the case put, yet they might respectively enter into contracts with respect to their expectations and possibilities, the evidence upon which they might perpetuate. The Law would frame an interest in respect of the contract, and with reference to that they would have a right to perpetuate testimony, though they could not qualify themselves as to any interest in the subject itself."

Nothing can be more clear and emphatic than these words of Lord *Eldon*, and I know of no case in which the law so laid down has been departed from or doubted.

Then has an expectant heir or next of kin any greater interest under a limitation to the heir or statutory next of kin of a living person? In *Meek* v. *Kettlewell* (2) it was held that an assignment

(1) Cited 6 Ves. 260; 15 Ves. 133, 136. (2) 1 Ha. 464; 1 Ph. 342.

by deed of a mere possibility was only a contract, and being voluntary could not be enforced in equity. The possibility there was the hope of succession as one of the next of kin of *Hannah Meek* under a limitation by will in trust for her next of kin, according to the statute, in case she left no issue. While *Hannah Meek* was living, one of her possible next of kin made this assignment. *Hannah Meek* died without issue, and the suit was instituted after her death to enforce the assignment. Vice-Chancellor *Wigram* (1) said that the assignor "at the time of the assignment, had nothing but an expectancy in the fund in question (like that of an heir in the lifetime of the ancestor)," and he dismissed the bill. This was affirmed by Lord *Lyndhurst*, who said: (2) "The assignment of an expectancy, such as this is, cannot be supported unless made for a valuable consideration."

This is a direct decision that the expectant next of kin take no greater interest under a limitation to next of kin than they would by the hope of an actual succession.

In *Clowes* v. *Hilliard* (3) Sir *G. Jessel*, M.R., had before him a case in which the limitation was identical with that which I have to deal with. A testator had left his residuary estate for the benefit of his three daughters and their issue, with an ultimate gift, if all of them died without issue, "in trust for such person or persons as would have been entitled to the residue of my trust estate under and according to the *Statutes of Distribution* in case I had then died intestate." The testator died in 1869. While the daughters were living and unmarried, some of the persons who would be next of kin of the testator, if they had all died unmarried, brought an action for administration of the estate as possible and presumptive next of kin entitled under the ultimate limitation. A demurrer was allowed, on the ground that they had not sufficient interest to maintain the suit. Yet the veriest scintilla of interest will entitle a person to maintain such a suit, as is shewn by such cases as *Joel* v. *Mills* (4); *Cosser* v. *Radford* (5). The Master of the Rolls said (6): "These plaintiffs, who claim to be some of the testator's possible next of kin, are in the

(1) 1 Ha. 475.
(2) 1 Ph. 347.
(3) 4 Ch. D. 413.
(4) 3 K. & J. 458.
(5) 1 D. J. & S. 585.
(6) 4 Ch. D. 416, 418.

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same position as persons claiming to be next of kin of a living person. *Ex hypothesi* the testator is to live on. Whether, therefore, you attempt to ascertain the next of kin of a living person or of a person dying at a future period, it is the same thing; there is no difference. You cannot predicate of anyone that he will be a member of the class." Later he criticizes *Roberts* v. *Roberts* (1), where Lord *Cottenham* made a difference between a widow and next of kin, and, noticing *Davis* v. *Angel* (2), he says, "it is a decision that nothing less than an interest will allow a man to maintain a suit."

That decision follows what was laid down in *Meek* v. *Kettlewell* (3), that possible next of kin have no greater interest during the life of the *propositus*, under a limitation to his statutory next of kin, than they would have in property which they hoped to take by succession to him, and shews that the same law applies where a time is fixed for the supposed death of the *propositus*, not the date of his actual death.

I have referred to this very familiar law, and the authorities upon it, because I am asked to follow a decision of eminent judges in *Ireland*, which, it is said, governs the case now before me: *In re Beaupré's Trusts* (4).

The facts in that case were as follows: By marriage settlement in 1830, £10,000 was settled in trust for wife for life, then husband for life, then children of wife by any husband, and in default of such children "in trust for such person or persons as according to the statutes for the distribution of the estates and effects of intestates in *Great Britain*, would, at the time of such failure of issue as aforesaid, have been the next of kin of" the wife, "if she had departed this life intestate and without having been married." The husband died in 1862, the wife in 1885, without having had issue. One of her next of kin, Lady *Nugent*, had married in 1860 without settlement, and her husband was adjudicated bankrupt in 1881. The contest was between Lady *Nugent* and the assignees in bankruptcy of her husband, the question being whether or not the share which belonged to Lady *Nugent* had become her separate property under the

(1) 2 Ph. 534.
(2) 4 D. F. & J. 524.
(3) 1 Ha. 464; 1 Ph. 342.
(4) 21 L. R. Ir. 397.

Married Women's Property Act, 1882, or whether her title had accrued before that Act, in which case the share belonged to her husband's assignees. It was decided first by the Master of the Rolls in *Ireland*, and on appeal by the Lord Chancellor of *Ireland*, with the concurrence of the Lords Justices *FitzGibbon*, *Barry*, and *Naish*, that Lady *Nugent's* title had accrued before the *Married Women's Property Act*, 1882, and that accordingly she had no separate estate, but that her share of the fund belonged to the assignees in bankruptcy of her husband.

The Master of the Rolls said that it was argued there could be no next of kin of a living person, and that the title of the next of kin and his right to payment arose at the same moment, namely, the death; therefore, till 1885, no one could predicate that he was or ever would be next of kin of the wife, and no title vested or contingent accrued prior to the passing of the Act. "Till the class is ascertained, it was argued, there was no title in any one, not even a contingent title within the statute. No authority for this proposition was referred to, which is a startling one. If it be well founded, it would apply to many cases besides the present—cases in which no question of next of kin would arise—such as where property is left to or settled upon the children of *A. B.*, living at a particular time, answering a particular description or the like, since the class cannot be ascertained till the event happens." He then cites the language of Lord Justice *Cotton* in *Reid* v. *Reid* (1); "there must be an accruer of title after, and not before, the passing of the Act; and the title must be considered as accruing when the married woman first acquires her interest in the property, whether such interest is at that time in possession, reversion, or remainder," "and of course also" the learned Master of the Rolls adds, "whether vested or contingent."

The Master of the Rolls then considers whether Lady *Nugent* had a contingent title to the fund before the Act, the policy of which he states to be, in the case of a previous marriage, to oust the marital right only in respect of property acquired after the Act in such a manner that it could not have been contemplated as part of the consideration of the marriage, or dealt with by

(1) 31 Ch. D. 408.

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husband and wife, or either of them, before the Act. He seems to consider that if the instrument under which the title accrued had been executed after *Vice-Chancellor Malins' Act*, Lady *Nugent's* title would have come within the description in that statute, "every future or reversionary interest, whether vested or contingent."

The Lord Chancellor on appeal treats *Reid* v. *Reid* (1) as having decided that if a woman married before the commencement of the Act had, before that time, acquired a title of any kind to any property, such property is not made her separate property by sect. 5 of the Act, though it falls into possession after the passing of the Act. His Lordship then says (2): "The title of the next of kin under the settlement of the 4th of June, 1830, was a title in contingency and in remainder. Their right to a contingent interest was hardly disputed"; and later on, after dealing with the maxim, "*Nemo est hæres viventis*," he says, "the settlement of the 4th of June, 1830, created a contingent limitation in favour of a class of persons who are of kin to the tenant for life, and capable of being ascertained. In my opinion, they had a right contingent on their surviving the tenant for life, under the marriage settlement, which is the foundation of their title."

Lord Justice *FitzGibbon* concurs in the conclusion, "though not without doubt." Lady *Nugent*, he says, "could have parted with her title by assignment, or dealt with it as she pleased as an existing and accrued title, though contingent as to its actual enjoyment. Her title deed is now the settlement of 1830." The word "title," in sect. 5, he treats as including "every kind of property," and he concludes by saying that Lady *Nugent's* title "accrued when the settlement was executed." Lord Justice *Barry* agrees, and Lord Justice *Naish* also, the latter saying, "It appears to me as much a contingent title as if the limitation had been to such of the nephews and nieces of *Sophia Southwell* as shall be living at her death."

If this were an English authority, I could do nothing but follow it; but decisions of the Irish Courts, though entitled to the highest respect, are not binding on English Judges. If,

(1) 31 Ch. D. 408. (2) 21 L. R. Ir. 407.

therefore, I cannot agree, I am bound to decide according to my own judgment.

I confess I am unable to come to any conclusion except one, which is contrary to this decision. I cannot help feeling great hesitation in opposing my opinion to that of so many eminent Judges; but I must say that, if it were not for this authority, I should have no doubt whatever about the right conclusion according to the English cases I have referred to. After all, the opinion I express is not so much mine as that of the Judges who decided those cases.

The point of difference, to state it shortly, is this: "*Nemo est hæres viventis*" should be construed literally. There is no such character in law as the heir of a living person or as his statutory next of kin. There is a wide difference, for this reason, between a gift to such of the "children" or "nephews" or even "kindred" of *A.* who shall be living at his death, and a gift to those who shall then be his statutory next of kin. During *A.'s* life there may be children, nephews, or kindred. Each of them has probably sufficient interest, though contingent, to take proceedings to protect the fund: see *per* Lord *Hatherley* in *Joel* v. *Mills* (1). Some or all of them might be made defendants in an action to administer the trusts. Neither of these things can be done where the gift is to statutory next of kin. They have no existence whatever in law while the *propositus* is living. No one can as possible next of kin even bring an action to perpetuate testimony as to his kinship during that period. I am unable to agree with the judgments which consider these cases as parallel.

As I have pointed out, the learned judges in *Ireland* treat the word "title" in sect. 5 as equivalent to "interest," citing Lord Justice *Cotton's* words in *Reid* v. *Reid* (2), to the same effect. With this I respectfully agree. One who has no interest whatever in property can hardly be said to have a title. But I have mentioned abundant authority to prove that no one can have any "interest" as heir or next of kin in the ancestor's lifetime. The familiar cases to which I have referred were not quoted; but I cannot suppose that they were not present to the minds of the learned judges whose judgments I have been considering.

(1) 3 K. & J. 474. (2) 31 Ch. D. 408.

KAY, J.
1890
In re PARSONS.
STOCKLEY *v.* PARSONS.

In *Reid* v. *Reid* (1) the Court of Appeal refused to accept the decisions upon the ordinary covenant in a marriage settlement to settle other or after-acquired property of the wife as a guide in determining what should be excluded under the word "title" from the operation of the 5th section of the *Married Women's Property Act*, 1882. Lord Justice *Cotton* adopted Vice-Chancellor *Wickens'* remark in *In re Clinton's Trusts* (2), that cases of that class must be approached with the presumption that the object of that covenant was to exclude the husband, whereas the object of the peculiar language of sect. 5 was to confine its operation to property in which the husband at the commencement of the Act had not any interest. Every one must, I think, agree in the reasonableness of this view, and it follows that if under a covenant to settle any property to which the intended wife "is contingently entitled" at the time of the marriage such a possibility as this which I am considering were included, it would not necessarily be within the words "contingent title" in sect. 5. But so far as I know no such possibility has ever been held to be included in such a covenant, and I confess I should have no difficulty in deciding that it could not be. For suppose the trust to have been declared before the marriage for the statutory next of kin of *A.*, and that *A.* did not die till after the determination of the coverture by the death of the husband subsequently to the passing of the Act, and that the widow was one of *A.'s* next of kin under the statute at his death, I should imagine it would be held without hesitation that the intended wife had not at or before the coverture any interest whatever, and therefore her husband could have none by reason of the coverture, and consequently the words of such a covenant, though they might include all property to which the intended wife had a contingent title at the date of the settlement, would not comprise such a possibility as this.

In *Atcherley* v. *Du Moulin* (3), a marriage settlement contained a covenant to settle which the Court held included all property to which at the date of the settlement the wife was "entitled." At that date the wife was contingently entitled under a bequest to all the daughters of her father living at his death who should

(1) 31 Ch. D. 406. (2) Law Rep. 13 Eq. 295.
(3) 2 K. & J. 186.

attain twenty-one or marry. The father died in 1854. This daughter had married in 1846, and her husband had died in 1851. Lord *Hatherley* (1) held, that "although she had the transmissible contingent interest, she had nothing during the marriage which could be called property to which she was entitled." . . . "The word 'entitled' might be large enough to include a contingent interest"; but upon regarding the whole of the settlement, he thought in that case it did not.

In *In re Mackenzie's Settlement* (2), where the covenant included anything to which the wife was entitled at its date, and she was then entitled in reversion after the death of her mother to a share of Consols, and her mother died during the coverture, Lord Justice *Turner* said in effect (3), "that if she was entitled contingently the covenant would reach it," *à fortiori* as she had a vested reversionary interest.

This was followed in *Cornmell* v. *Keith* (4), where the interest was in remainder expectant on the death of the wife without issue; this contingent reversionary interest was bound.

It appears, therefore, that the Courts have hesitated to hold the word "entitled" in such a covenant to include a contingent reversionary interest under such a limitation as "to the children of *A.* living at his death," though now that would probably be held to be included. But this, so far as I know, is the furthest extent to which the construction of that familiar covenant has gone.

I am bound to follow the English decisions to which I have referred.

I must hold that the property in this case first accrued in title and interest to *Elizabeth Parsons* on the death of *Eliza Bird* on the 21st of May, 1886, and that by sect. 5 of the *Married Women's Property Act* she was entitled to it for her separate use, and that it passed by her will dated in 1889.

Solicitors: *Samuel Price & Son; Ullithorne, Currey, & Villiers,* agents for *C. B. Roche, Daventry.*

(1) 2 K. & J. 193.
(2) Law Rep. 2 Ch. 345.
(3) Law Rep. 2 Ch. 348.
(4) 3 Ch. D. 767.

CHITTY, J.
1890
June 4.

In re TUNNO.
RAIKES *v.* RAIKES.

[1886 T. 1728.]

Will—Legacies out of Proceeds of Sale—Deficiency—Failure of one Legacy—Abatement—Residuary Legatee.

Testatrix bequeathed her diamonds upon trust for sale, and thereout to pay two legacies of £600 and £700; the will contained a residuary bequest, but did not otherwise deal with the surplus (if any) of the proceeds o sale. The diamonds only realized £900; the legacy of £700 failed:—

Held, that the £600 legacy was not liable to abate in favour of the residuary legatee, but was in effect a first charge on the proceeds of sale, which must be satisfied before the residuary legatee could take anything.

Page v. *Leapingwell* (1) distinguished.

ADJOURNED SUMMONS.

Caroline Tunno, who died in November, 1884, by her will of the 6th of January, 1864, bequeathed to her trustees all her diamonds and diamond ornaments upon trust for sale as soon as conveniently might be after her decease, and upon trust, in certain events which happened, by and "out of the proceeds of such sale, to lay out and expend such a sum or sums of money not exceeding in the whole the sum of £600, in repairing the parish church of *Warnford*, in the county of *Hants*, as they the said trustees or trustee, or any two of them, shall, with the consent of the churchwardens and minister for the time being of the said church, in their or his discretion think proper and necessary, such repairs to be commenced within the period of twelve months from the time of my decease;" but if the church were already repaired, or if a part only of the said sum should have been expended in such repairs as aforesaid, then she directed that the said sum of £600, or so much thereof as was unexpended, should fall into and form part of her residuary estate. The testatrix also directed her trustees to lay out a further sum of £700 out of such proceeds of sale in the building of six labourers' cottages. The will contained a residuary bequest, but did not otherwise deal with the surplus, if any, of the proceeds of sale of the diamonds. The diamonds realized a little over £900. The

(1) 18 Ves. 463.

trustees did not commence the repairs of the church within twelve months from the death of the testatrix; the gift of £700 for labourers' cottages had been declared void by an order of the 26th of July, 1886, for reasons not material to this report. On the 10th of December, 1889, the residuary legatee took out the present summons asking for a declaration that under the circumstances the whole of the proceeds of sale of the diamonds fell into and formed part of the residuary estate.

The only question argued and calling for a detailed report was whether, if the words in the will as to commencing the repairs of the church within twelve months were directory only, the £600 must abate in favour of the residuary legatee, inasmuch as the proceeds of sale of the diamonds were insufficient to provide both the £600 and the £700; or whether the vicar and churchwardens of *Warnford* Church could avail themselves of the fact that the £700 legacy had failed so as to get their full £600.

Romer, Q.C., and *S. Dickinson* (*Rigby*, Q.C., with them), for the Plaintiff:—

First, we say that the direction to commence the repairs within twelve months was imperative, and that as this direction was not complied with, the legacy falls into the residue. Secondly, even if the direction was not imperative, the £600 legacy ought not to be paid in full: the diamonds did not produce enough to pay these two legacies of £600 and £700, therefore there was an abatement from the very first, and the fact that under the circumstances the £700 legacy is no longer payable, makes no difference, and there must be an abatement or apportionment of the £600 legacy as between the vicar and churchwardens and the residuary legatee: *Page* v. *Leapingwell* (1).

Sir *Arthur Watson*, Q.C., and *Wheeler*, for the vicar and churchwardens, who were not called upon on the first question:—

As to the question of abatement, there is none in favour of the residuary legatee. The Plaintiff presents his case as if he stood in the position of the legatee of the £700; this is not so. In *Page* v. *Leapingwell* the proceeds of sale, which the testator expected would be not less than £10,000, were disposed of in aliquot shares

(1) 18 Ves. 463.

CHITTY, J. 1890 *In re* TUNNO. RAIKES *v.* RAIKES.

among the different legatees, and the failure of one of the legacies, either by death or because it was given to a charity, could not have the effect of increasing the shares of the other legatees; that is not the case here. The whole decision in *Page* v. *Leapingwell* (1) turned on the point that it was a gift of an aliquot portion to each legatee. *Currie* v. *Pye* (2) is a decision in favour of our contention.

[CHITTY, J.:—The testatrix has not divided the proceeds of sale of the diamonds into aliquot parts; and if they had produced £2000 you could have received no more than £600.]

That is so; but we say this £600 is a first charge on the proceeds of sale, and we are entitled now to be paid in full.

Romer, in reply:—

The Respondents have misunderstood *Currie* v. *Pye*; it is a decision in favour of the residuary legatee. These two gifts are specific legacies of £600 and £700, for the payment of which the proceeds of sale were insufficient, therefore as soon as the sale was made for £900 they abated; if one of the legacies fails the other still abates. We only contend that the legatees of this £600 should not claim the benefit of the lapse of the £700. [*Roper* on Legacies (3) was referred to.]

G. A. Watson, for the trustees of the will, took no part in the argument.

CHITTY, J. (after stating the will, the facts, and the points raised by the summons, and deciding that the words in the will as to commencing the repairs within twelve months were directory only, and that consequently the £600 legacy was still payable, continued):—

Then a further point is raised, which is this: It is said on behalf of the residuary legatee, that as the gift of £700, to be paid out of the proceeds of sale of the diamonds, has failed, there is a lapse for the benefit of the residuary legatee. The diamonds did not produce £1300, but only about £900, and the argument on behalf of the residuary legatee is, that this £600

(1) 18 Ves. 463. (2) 17 Ves. 462. (3) 4th Ed. pp. 413, 414.

legacy must abate, the vicar and churchwardens thus taking six-thirteenths of the £900 only. It is plain that as between the legatee of the £700, had that legacy taken effect, and the legatees of this £600, there must have been an abatement in the proportions named; but it does not follow that the residuary legatee can therefore claim seven-thirteenths of the £900. It is clear that if a specific property is given in trust for *A.* and *B.* as tenants in common in equal shares, and *B.* dies in the testator's lifetime, *A.* takes only one-half of the property; and it is equally clear that the same result follows whatever be its fractions in which the property is divisible among the specific legatees. It is clear, too, that if property be given upon trust for sale, with a direction to divide the proceeds into aliquot portions, the gift intended in each case, is that of a specific proportion only of the fund which the testator is disposing of, and the argument on behalf of the residuary legatee proceeds on the assumption, that on the true construction of this will, there is a gift to these two legatees of aliquot portions of the proceeds of sale of the diamonds. It is plain to my mind that that is not the true interpretation of this gift. It is not as if the testatrix had said, I direct my diamonds to be sold for not less than a sum of £1300, and I thereout give £600 to the Church, and £700 to someone else: that would have amounted to a gift of the fund in specific proportions; but she has not done that. The foundation of the argument for the residuary legatee is the well-known case of *Page* v. *Leapingwell* (1). In that case the sum of the gift, to put it quite shortly, was: I distribute £10,000 in aliquot proportions among certain named legatees, with a gift over of the overplus moneys arising from the sale, upon certain trusts, and on the question of construction as to the meaning of the word "overplus," Sir *William Grant* held, that it was equivalent, in that case, to a sum of £2200, being the fractional remainder of the sum of £10,000; for the testator in that case, having directed a sale for not less than £10,000, Sir *William Grant* held, that there was in substance a division of that sum, in specific or aliquot portions, among named legatees, who were to take as tenants in common in the proportions named, and it

(1) 18 Ves. 463.

CHITTY, J. 1890 *In re* TUNNO. RAIKES *v.* RAIKES.

followed that if any one of them died in the lifetime of the testator, or if for any other reason the gifts to any of them failed, such event did not increase the benefit intended to be given to the other tenants in common. That decision has no application to the present case. To my mind, it is not open to argue on the construction of this will, that there is a gift here in fractions or aliquot proportions, of the proceeds of sale; it contains no statement of the amount of the fund to be disposed of, nor of the sum for which the diamonds are to be sold, nor is there, in terms, any gift of the overplus, in the event of the jewels realizing more than £1300; had the diamonds realized £2000 no disposition is made in the will of the surplus, except in so far as such surplus would be swept up by the general residuary gift. It is clear that if these jewels had sold for, say £2000, the legatees of this £600 would not have taken any more than £600—they could not have claimed six-thirteenths of the £2000. In the result, the gift here is, to take a simple illustration, the same as if a testator were to give all the Consols he was possessed of at his death upon trust for sale, and thereout to pay a legacy of £600 to *A.*, and another legacy of £700 to *B.*, in which case, there being no priority between the two, if the Consols turned out to be insufficient, abatement would be necessary; but in any case the charges on the Consols would have to be paid before the residuary legatee could come in. The argument for the residuary legatee in this case appears to me to be an attempt to creep into the shoes of the legatee of the £700 as if that legacy had taken effect; but this legacy has failed, and the residuary legatee is entitled to claim, not the legacy of £700, but only so much of the proceeds of sale of the diamonds as is not required to satisfy the £600 legacy; in other words, the residuary legatee can take nothing until this specific charge of £600 has been satisfied. It is not necessary for me further to consider the authorities; the result is, I hold that the contention of the residuary legatee fails, and that this £600 legacy must be paid in full.

Solicitors: *Francis & Johnson; H. R. Reynolds; Harries, Wilkinson, & Raikes.*

W. C. D.

In re ROBSON.

NORTH, J.

1890

May 10, 14.

Solicitor—Costs—Taxation—Scale Fee—Lease in consideration of Rent and Premium—General Order under Solicitors' Remuneration Act, 1881, *Sched. I., Part II., rr.* 1, 5.

When a lease is granted in consideration partly of a premium and partly of a rent, the lessor's solicitor is, under rule 5 in Part II. of Sched. I. to the Solicitors' Remuneration Order, 1882, entitled to the scale fee mentioned in that rule in respect of the premium, even though no abstract of the lessor's title to the property has been furnished to the lessee.

SUMMONS by a solicitor to review a taxation of costs.

Mr. *J. E. Robson* acted as solicitor for the lessor in respect of a lease of some property to the Respondents to the summons. There being no agreement to the contrary, the costs of the lease were payable by the lessees. The lease was for a term of ninety years from the 29th of September, 1883, at an annual rent of £50, and the further consideration of a premium of £4400 to be paid by the lessees to the lessor. The lessees were not entitled to call for the lessor's title to the property. The solicitor delivered to the lessees a bill of costs amounting to £59 10*s.* This account was made up of £14, the scale fee under the Solicitors' Remuneration Order of August, 1882, corresponding to the rent; £42, the scale fee under the same Order corresponding to the amount of the premium; and £3 10*s.* for disbursements. The bill was referred for taxation, and the Taxing Master disallowed the £42, but he gave the solicitor an opportunity of bringing in an additional bill of costs under the old system, as altered by Sched. II. to the Remuneration Order. The Taxing Master was of opinion that, there having been no deduction of title to the property, rule 5 (1) of the Rules applicable to Part II. of Sched. I.

(1) Part II. of Sched. I. to the Remuneration Order contains two scales of charges. The first scale is headed, "Scale of charges as to leases, or agreements for leases, at rack-rent (other than a mining lease, or a lease for building purposes, or agreement for the same)," and it provides for "lessor's solicitor for preparing, settling, and completing lease and counterpart," a fee varying with the amount of the rent. The second scale is headed, "Scale of charges as to conveyances in fee, or for any other freehold estate, reserving rent, or building leases reserving rent, or other long leases not

NORTH, J. 1890 *In re* ROBSON.

to the Remuneration Order did not authorize the charge of a scale fee in respect of the premium for the lease.

Vernon R. Smith, for the solicitor:—

Rule 5 clearly contemplates that, whenever a lease is granted in consideration partly of a premium and partly of a rent, the lessor's solicitor shall be remunerated in proportion to the amount of the premium as well as in proportion to the amount of the rent. If the Taxing Master's construction of the rules is right, the result will be, that, if a lease is granted in consideration of a rent of £1 and a premium of £10,000, the solicitor will practically have no remuneration at all. This cannot have been intended.

[He was stopped by the Court.]

Swinfen Eady, for the lessees:—

The question is, whether the solicitor is entitled to be paid for work which he has not done. There has been no deduction of title or preparation of abstract. If there had been a purchase at a price equal to the premium, the vendor's solicitor would not have been entitled to the scale fee mentioned in Part I. of Sched. I., unless he had done all the work for which the fee is prescribed—that is, unless he had deduced the title to the

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at rack-rent (except mining leases), or agreements for the same respectively," and it provides for "vendor's or lessor's solicitor for preparing, settling, and completing conveyance and duplicate, or lease and counterpart," a fee varying with the amount of the rent. The second scale is followed by a set of six rules, headed, "Rules applicable to Part II. of Sched. I. as to all leases or conveyances at a rent, or agreements for the same, other than mining leases and agreements therefor."

By rule 1: "Where the vendor or lessor furnishes an abstract of title, it is to be charged for according to the present system as altered by Sched. II."

Rule 5: "Where a conveyance or lease is partly in consideration of a money payment or premium, and partly of a rent, then, in addition to the remuneration hereby prescribed in respect of the rent, there shall be paid a further sum equal to the remuneration on a purchase at a price equal to such money payment or premium."

Part I. of Sched. I. contains a "Scale of charges on sales, purchases, and mortgages, and rules applicable thereto," and it provides (*inter alia*) fees, by means of a percentage on the price, for "vendor's solicitor for negotiating a sale of property by private contract;" "for conducting a sale of property by public auction;" and "for deducing title to freehold, copyhold, or leasehold property, and perusing and completing conveyance (including preparation of contract or conditions of sale, if any)."

property and perused and completed the conveyance. That is the effect of the decision of the Court of Appeal in *In re Lacey & Son* (1). The principle of that decision applies to the provisions relating to the remuneration for leases. In both scales the solicitor's remuneration is based on the annual rent, and in both the fee includes only "preparing, settling, and completing lease and counterpart." If the solicitor is not otherwise paid for furnishing an abstract of title, then rule 1 applies, and he is to be remunerated under Sched. II. If the lease is granted partly in consideration of a premium, then rule 5 applies, and, if an abstract of title is furnished, the solicitor is to be remunerated by a scale fee in respect of the premium, as in the case of a purchase at a price equal to the premium; but the scale fee is not payable if an abstract is not furnished. Under both scales the solicitor is not entitled to anything beyond the scale fee in respect of the rent, unless he does the work of preparing and furnishing an abstract. On any other construction the solicitor would be either paid twice over for work which he had done, or paid for work which he had not done at all.

Vernon R. Smith, in reply:—

Lord Justice *Lindley*, in *In re Field* (2), said (referring to rule 5), "we find that if a lease is granted for a premium the purchase scale applies to the premium." The Taxing Master, in allowing the solicitor to send in an additional bill under Sched. II., is really allowing him to charge over again for work for which he has been already in part paid by the scale fee in respect of the rent—that is, for "preparing, settling, and completing lease and counterpart."

1890. May 14. NORTH, J. (after stating the facts as above, continued):—

The Taxing Master has arrived at his conclusion as the result of the provisions in the 2nd part of Sched. I. to the General Order under the *Solicitors' Remuneration Act*, 1881, which fixes two scales of charges, the first being that of charges payable to a "lessor's solicitor for preparing, settling, and completing lease

(1) 25 Ch. D. 301. (2) 29 Ch. D. 608, 616.

NORTH, J. 1890 *In re* ROBSON.

and counterpart" in cases of lease or agreement for lease at rack-rent (not including mining or building leases); and the second that of charges payable to a "vendor's or lessor's solicitor for preparing, settling, and completing conveyance and duplicate, or lease and counterpart," in cases of conveyances in fee or for any other freehold estate reserving rent; or building leases reserving rent; or other long leases not at rack-rent (except mining leases); and it is the latter scale, if either, which applies in the present case. Then the fifth of the rules applicable to Part II. provides, "where a conveyance or lease is partly in consideration of a money payment or premium, and partly of a rent, then, in addition to the remuneration hereby prescribed in respect of the rent, there shall be paid a further sum equal to the remuneration on a purchase at a price equal to such money payment or premium." The Taxing Master has allowed the sum of £14 as the fee according to the scale on the rent, but has not allowed the £42, the scale fee claimed upon the premium. His view is, that any such scale fee must be a sum equal to the remuneration on a purchase at a price equal to the premium—viz., in the present case, £4400; but that, as the solicitor would not, if this were a purchase at that sum, be entitled to any scale fee, because he has not negotiated or conducted the sale, nor deduced any title to the property, he, therefore, does not come within the provisions of Part I. of the first schedule, and there is no scale fee applicable to the case. He has held, however, that, although the solicitor is not entitled to any scale fee on the premium, he is entitled, in addition to a scale fee on the rent, to the remuneration prescribed by the Act in respect of business the remuneration for which is not prescribed in Sched. I.—viz., remuneration according to the old system as altered by the second schedule—and he gave the solicitor an opportunity of bringing in a bill of costs to be taxed upon that footing. The solicitor, however, has not adopted that course, but insists that he is entitled to be allowed the £42, the scale fee on the premium. In giving to the solicitor this option of bringing in a bill the Taxing Master was, in my opinion, clearly wrong. Supposing the solicitor had, as he was invited to do, brought in a proper bill under the old system, it would have contained full

charges for all the work done, and the Master must have allowed the whole of it, for he would have had no power, under the new or old or any system, to have allowed such sum only in respect of that bill as bore to the total amount of the bill the same proportion that £4400 bore to the value of the whole consideration for the lease—*i.e.*, the premium *plus* the rent. In this case, therefore, the solicitor would have got his full bill of costs under the old system as altered by Sched. II., and would have received in addition a scale fee calculated on the rent. This view of the case seems to me clearly inadmissible. A solicitor must, in my opinion, be paid either according to the scale, or, independently of the scale, according to the old system as altered by Sched. II.; and cannot in respect of one and the same piece of business be entitled to receive a compound remuneration made up in part of a scale charge and in part of a bill of costs in addition for professional work as distinguished from disbursements. This is not authorized by the Act or order or rules, except expressly in one particular case hereinafter referred to; and it would be to some extent giving double remuneration for the same work. This was also, I think, the view of Mr. Justice *Chitty* in *In re Hickley & Steward* (1). The question then is, whether the solicitor is to be paid (*a*) by a scale charge on the rent and on the premium; or (*b*) by a bill of costs according to the old system as altered by Sched. II. The case falls exactly within rule 5 of Part II. of the schedule—viz., the lease is partly in consideration of a rent and partly of a money payment or premium. That rule provides that, "in addition to the remuneration hereby prescribed in respect of rent there shall be paid"—not a bill of costs, but "a further sum equal to the remuneration on a purchase at a price equal to such money payment or premium." It does not say that the vendor's or lessor's solicitor is to be remunerated as if, to this extent, the transaction was a purchase, but that he is to be remunerated in the case of a lease or conveyance reserving rent by a sum equal to the remuneration on a purchase—a sum to be ascertained by reference to something else in the rules, to which reference effect must be given if possible. As we are dealing with the case of vendor's

(1) 33 W. R. 320.

NORTH, J. 1890 *In re* ROBSON.

or lessor's solicitor, the rule would have been more happily expressed and more accurate, if it had referred to remuneration on a sale instead of on a purchase; but the meaning is obvious.

Now, to what is reference here made? Remuneration on sales is given by Part I. of Sched. I. to vendors' solicitors for three things—(1) negotiating a sale by private contract; (2) conducting a sale by public auction; and (3) deducing title to property and perusing and completing conveyance. The first of these cannot be intended; for it is well settled by *In re Field* (1), and later cases, that no charge can be allowed for negotiations in business coming within Part II. of Sched. I.; nor can the second be meant, for there is very little connection between sales by auction and the matters dealt with in Part II. The reference must, therefore, be to the remuneration payable to a vendor's solicitor for deducing title and perusing and completing conveyance. And it is said that, as the scale fee on a purchase (or sale) is not payable unless the title is deduced as well as the conveyance completed (see *In re Lacey & Son* (2), *Newbould* v. *Bailward* (3)), so it cannot be allowed on a lease when the business is completed without deducing title. But it is clear that the two cases are not assimilated for all purposes. For instance, on a sale under Part I. a solicitor who negotiates a sale and deduces title and prepares conveyance receives separate fees for each, while a solicitor who negotiates a conveyance or lease coming under Part II. receives no fee for negotiating. Again, the law is established, that a lessee is not, in the absence of express contract to that effect, entitled to call for his lessor's title, and such title notoriously is scarcely ever required, and it would be rather absurd, I think, to hold that the reference in rule 5 to remuneration in respect of the premium has relation only to the very rare cases of leases in which the lessor has by special contract to deduce his title; and that far the larger number of cases in which leases are granted in consideration in part of a premium, without any title being deduced, are unprovided for by the rule. In fact, it is clear that the framers of the rules applicable to Part II. of Sched. I. had in mind that title is not

(1) 29 Ch. D. 608. (2) 25 Ch. D. 301.
(3) 14 App. Cas. 1.

ordinarily deduced on grants of leases, and that those rules are not confined to leases on the grant of which title is deduced; for the first rule applicable to Part II. expressly provides that, if a vendor or lessor furnishes an abstract of title, it is to be charged for according to the existing system as altered by Sched. II., and this is the one case in which the Order allows remuneration by a bill of costs in addition to scale fees. It is obvious that this charge is in addition to and not in lieu of a scale fee; for the rule merely allows a separate charge for what is but a small part of the deducing of title; and it could not be intended that in cases where title is deduced the solicitor should not receive any remuneration for deducing title except the charge for the abstract. The provisions of rules 5 and 1, that the solicitor is to have a scale fee on the premium, and, if an abstract is furnished (which is part of the deduction of title), is to have something more, is, in my opinion, quite inconsistent with the contention that, if title is not deduced (*i.e.*, if an abstract is not furnished), he is not to have even any scale fee on the premium or other remuneration in respect thereof. If that were so, in the not uncommon case of a lease at a nominal or small rent and a large premium, no title being deduced, a solicitor would receive only a very moderate and possibly inadequate remuneration for his work—a state of things scarcely contemplated by the framers of the Act, Order, and rules. In my opinion, the language of rule 5, referring to a further sum equal to the remuneration on a purchase at a price equal to the premium, was intended to avoid the repetition of the table shewing the rate or scale of remuneration, as though there had been a reference to it *mutatis mutandis*, and was not meant to narrow its application to cases precisely identical, or to exclude almost all leases at a premium from its operation. Under these circumstances, I have come to the conclusion that the solicitor is entitled to the £56 which he claims for remuneration; and the matter must go back to the Taxing Master to review his taxation. The solicitor must have his costs of this application.

Solicitors: *J. E. Robson; Hasties.*

W. L. C.

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1890

May 9.

KINAHAN *v.* KINAHAN.

[1890 K. 218.]

Practice — Writ — Leave to Issue — Injunction — Trade-mark — Infringement — Service out of Jurisdiction — Irish Action — Irish Firm — English Firm — Rules of Supreme Court, 1883, *Order* XI. *rr.* 1 (*f*), 2 — *Rectification — Pending Motion — English Proceedings — Patents, Designs, and Trade Marks Act*, 1883, *ss.* 90 *sub-s.* 1, 110, 111, 117.

An action was brought in *England*, by a firm having places of business in *Dublin* and *London*, to restrain the Defendants, a limited company, having its registered office in *Belfast*, from infringing the Plaintiffs' trade-mark by the sale of goods under a similar trade-mark in *England*.

The Defendants had no agents or depôts in *England*, but supplied occasional customers in *England* direct from *Belfast*. A motion was also pending in *England* by the Plaintiffs, under sect. 90 of the *Patents, Designs, and Trade Marks Act*, 1883, to expunge the Defendants' trade-mark, and it was proposed by the Plaintiffs that the action and motion should come on together:—

Held, that the action was to be regarded as practically an Irish and not an English action; and an order obtained *ex parte* by the Plaintiffs, under Rules of Supreme Court, 1883, giving them leave to issue and serve the writ out of the jurisdiction, was, notwithstanding the pending motion to expunge, discharged with costs.

THIS was an action for an injunction to restrain the Defendants from infringing the Plaintiffs' trade-mark, and from selling as "*Kinahan's Whiskey*" any whisky other than the Plaintiffs'; and from passing off their goods as the Plaintiffs'; for an inquiry as to the amount of profits made by the Defendants' sales, and for delivery-up of all bottles, &c., bearing any labels which were an infringement of the Plaintiffs'.

On the 31st of March, 1890, upon an *ex parte* application to the Judge in Chambers, under Rules of Supreme Court, 1883, Order XI., rule 1 (*f*), the Plaintiffs obtained an order giving them leave to issue the writ in the action, and to serve it upon the Defendants, who were out of the jurisdiction, the order being made upon an affidavit filed by the Plaintiffs' solicitor stating to the following effect:—

The Plaintiffs carried on business as wine and spirit merchants

in *London* under the firm of *Kinahan & Co.*, and were the proprietors of a trade-mark or brand known as "*Kinahan's L L Whiskey*," their whisky being known to the trade and the public, as they alleged, as "*Kinahan's Whiskey*." In 1876 they registered, under the *Trade Marks Act*, 1875, a label, the essential particulars of which were the words "*Kinahan's L L Whiskey*." On the 28th of December, 1888, they applied to register the words "*Kinahan's Whiskey*" alone as an old mark; but the Comptroller declined to register them without an order of the Court, on the ground that they would conflict with a prior registration in 1878 by Messrs. *Lyle & Kinahan*, wine and spirit merchants of *Belfast*, in *Ireland*, of a label, the essential parts of which were the words "*Kinahan's V O Whiskey*."

The Plaintiffs, *Kinahan & Co.*, having been advised that the Comptroller, in view of the prior registration by them of the words, "*Kinahan's L L Whiskey*," ought not to have registered *Lyle & Kinahan's* label with the words, "*Kinahan's V O Whiskey*," served the Comptroller with a notice of motion to rectify the register by expunging that trade-mark, and were about to serve it forthwith on the registered owner or owners of that trade-mark. That trade-mark had been assigned by the registered owner, the Defendant *Frederick Kinahan*, a member of the firm of *Lyle & Kinahan*, to the Defendants, "*Lyle & Kinahan, Limited*," a company formed for the purpose of taking over the business of that firm; but the assignment had not yet been registered. The affidavit then proceeded as follows: "It has recently come to the knowledge of the Plaintiffs that the said *Lyle & Kinahan, Limited*, are selling their whiskey as '*Kinahan's Whiskey*,' and are executing orders for '*Kinahan's Whiskey*' both in this country and in *Ireland* with whiskey other than that of the Plaintiffs, and are thereby passing off on the public the whiskey of the Defendants, in consequence whereof the Plaintiffs are suffering damage to their reputation. The Defendant, *F. Kinahan*, I am informed and believe, is a British subject residing in *Belfast, Ireland*, and the Defendants, *Lyle & Kinahan, Limited*, are a joint stock company having its registered office in *Dublin*, but exporting whiskey to this country. Having regard to the fact that the motion to expunge the said trade-mark of the said *F. Kinahan*,

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or *Lyle & Kinahan, Limited*, will be heard before this Honourable Court, the Plaintiffs are desirous that leave should be given to issue a writ out of this Honourable Court to be served upon the Defendants in *Ireland*, under Order XI., r. 1, sub-s. (*f*), for an injunction to restrain the Defendants from selling whiskey under the designation of '*Kinahan's Whiskey*.' As the motion to expunge the said trade-mark will be heard in this High Court, it will save expense to the parties and be far more convenient if the action is also heard here; and I believe that the Plaintiffs are ready and willing that the action and motion should, if this High Court think fit, be heard together."

In pursuance of the leave given by the order of the 31st of March, the writ was issued and served upon the Defendants accordingly.

The Defendants now moved to discharge that order and to set aside the service of the writ, on the ground that the Defendant, *F. Kinahan*, resided, and the Defendant company had its registered office and carried on business, in *Ireland*, and that neither of the Defendants carried on or had a place of business within the jurisdiction of this Court; that there was a concurrent remedy in Ireland in respect of the cause of action sued for; and that, having regard to the comparative cost and convenience of proceedings in *England* and *Ireland*, this Court should in its discretion set aside such order and service.

In support of that motion, the manager of the Defendant company filed an affidavit stating that the Plaintiffs had a place of business in *Dublin* (a fact which had not been stated in the affidavit of the Plaintiffs' solicitor); that the Defendants were a company carrying on their business at *Belfast* alone; but that their whisky, sold under the brand of "*Kinahan's V O Whiskey*," had acquired very great repute, extending beyond *Ireland*, and that they received orders from all parts of the *United Kingdom*, and from *Europe*, *America*, *India*, and *Australia*; that they had no business premises or depôt in *England*, and had not exported or consigned goods to any person or place in *England* for sale on their account; that they had no property or stock of goods in *England*; that the only business transacted by them in *England* had consisted of the supplying customers with whisky to their order, and that

they issued no advertisements in *England* beyond the usual trade circulars to customers; that they had no agents in *England*, orders being sent direct to the company by customers, to whom the goods were sent direct from *Belfast*, exactly in the same way as goods supplied to Irish customers, no difference whatever being made, in supplying goods, between customers in *England* and in *Ireland*; that the question in dispute in the action was really a question between two Irish firms as to the mode of carrying on their respective businesses, and that to save expense, and for the sake of convenience, the action ought to be tried in *Ireland*, where the witnesses on both sides were resident; that the Defendants were quite ready to maintain their right to their trade-mark, and that the further proceedings on the motion to expunge should be stayed until the result was known of proper proceedings to be taken in *Ireland* for the purpose of deciding the question which had been raised in the present action.

The Plaintiffs, in reply, filed an affidavit stating that it would be far more convenient to them that the action should be tried in *London*, on the ground of the pending motion to expunge, and that the witnesses on the motion chiefly consisted of merchants and exporters residing in *London*, and would be practically the same in the action, which should be tried with the motion, so as to save the expense of a double trial.

Renshaw, Q.C., and *Whinney*, for the Defendants:—

The order ought to be discharged. The affidavit on which it was given suppressed the important fact that the Plaintiffs had a place of business in *Dublin*, and also failed to state that the Plaintiffs had a good cause of action.

In allowing service out of the jurisdiction under Rules of Court, 1883, Order XI., rule 1 (*f*), the Court must, under rule 2, "have regard to the comparative cost and convenience of proceeding in *England*." We submit it is clear from the evidence that these proceedings could more conveniently take place in *Ireland*, where there is a concurrent remedy. This is purely an Irish case, and there is no good reason for electing to take the proceedings here. The Irish Courts have full jurisdiction to deal with proceedings, whether by action or motion, relating to

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patents: *Patents, Designs, and Trade Marks Act*, 1883, ss. 90 sub-s. 1, 110, 111, 117.

Moreover, an injunction of this Court, even if obtained, could not be enforced against us, as we have no property or agents in this country: *Marshall* v. *Marshall* (1). In *In re Burland's Trade Mark* (2), leave was given to issue the writ out of the jurisdiction, expressly because the defendants had branch businesses and property in *England*.

Marten, Q.C., *Moulton*, Q.C., and *Willis Bund*, for the Plaintiffs:—

We submit that the discretion given to the Court by the rules was properly exercised, and that no case has been made for setting the order aside. To set aside an order of this kind, the Defendant must shew that the discretion was not properly exercised upon the facts then shewn. We have shewn a clear case of trading in this country, sufficient to give this Court jurisdiction; and, moreover, we have a motion actually pending in this country under sect. 90 of the *Patents, Designs, and Trade Marks Act*, 1883, for rectification of the register, and it would be more convenient that this action should be heard with the motion, as both relate to the same matter. It is true that in *Marshall* v. *Marshall* there was also a trade-mark motion; but it was a motion to register a mark, not, as here, a motion to expunge. Our motion is a *bonâ fide* one, for the letters "*L L*" used by us have already been held sufficient to constitute a good trade-mark: *Kinahan* v. *Bolton* (3); *Sebastian* on Trade-marks (4).

KEKEWICH, J.:—

This jurisdiction requires to be carefully watched and carefully exercised; and I admit that, in exercising it, the Judge is bound to do that which Mr. Justice *Chitty* did in the case of *In re Burland's Trade Mark*, namely, to look carefully into the facts before him; but it is often a difficult matter to satisfy oneself, on the evidence which is presented in a case of this kind, whether the case is a proper one under Order XI. or not; and, in my experience, it very seldom happens that the affidavit in support of the

(1) 38 Ch. D. 330.
(2) 41 Ch. D. 542.
(3) 15 Ir. Ch. Rep. 75.
(4) 2nd Ed. p. 68.

ex parte application under that order, notwithstanding that it is generally made by the plaintiff's solicitor, strictly or satisfactorily complies with the exigencies of the order. In this particular case there is this extraordinary omission in the solicitor's affidavit, that there is no plain, simple statement of the belief that the Plaintiffs have a good cause of action. There is a statement which may be and was in fact accepted as an equivalent, namely, that the Defendants were infringing the Plaintiffs' trade-mark; but the plain statement which the affidavit ought to have contained, and for the omission of which there really is no excuse, is not there. Frequently other slips occur in such cases, and make the duty of the Judge extremely difficult—and for this reason. If, according to what I hold to be the most convenient practice, the Judge in Chambers simply endorses the application "insufficient," and sends it back, the deponent or his solicitor wants to know, and is not satisfied unless he is told, in what respect it is insufficient; and if he is told, he invariably supplies what is wanted; and one, unfortunately, cannot help thinking that he has merely supplied it because it is wanted. I only mention these things to shew how extremely difficult it is to deal with these cases, and to justify my remark that the jurisdiction requires to be carefully watched. I cannot doubt that it is right for the judge to review his discretion if circumstances are brought before the Court which justify such reviewal. I entirely follow Mr. *Marten's* observation, that a defendant coming here to challenge an order made on an *ex parte* application is bound to shew a good reason why the discretion before exercised should be reversed—that is to say, where it is a discretion exercised on facts sufficient in the first instance to justify an order. I certainly think a Judge is bound to review his discretion if additional facts are brought to his notice; and Mr. Justice *Chitty*, although he upheld his order, took that course in the case of *In re Burland's Trade Mark* (1).

Here, I have no doubt, on again reading through the affidavit, that I had no alternative but to allow the writ to issue; but now I have to consider whether, on the additional facts, the writ which has been allowed to issue ought now to stand as issued for service out of the jurisdiction. The case is against a trader in *Ireland*—

(1) 41 Ch. D. 542.

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I will treat the two Defendants as one—carrying on business in *Ireland*; and the ground for service out of the jurisdiction is injunction. It is said that that is only a small part of the relief claimed, and that accounts of profits, and so forth, are wanted besides; but all that flows from the injunction, and we have, therefore, a case so far falling within the order. But the injunction is to restrain what? To restrain the sale of goods with a certain label or trade-mark. Where are the Defendants' goods sold? They say, in *England*, *Ireland*, and elsewhere, which may be taken as an exhaustive description of the world for trading purposes, and sufficiently accurate for the present purpose. I have it sworn distinctly that the Defendants have no business premises and no agents in *England*, but that, like many other traders carrying on business in *England*, *Scotland*, or abroad, they do supply occasional customers in *England*, sending over such goods as such customers order; but that beyond that they have no business in *England* at all. I have evidence, no doubt, that they do a large business elsewhere—that is to say, out of *England* and *Ireland*. How that is done I cannot say; but I will assume that they do a large business in some such way, and undoubtedly they do a large business in *Ireland*.

Now, as regards this small business done in *England*, it is not sufficient to justify the Court in issuing the writ for service on the Defendants in *Ireland*. If it were their principal business—even if it were a large proportion of their business—the case might have been different; but it is only a small portion which is carried on in the particular way I have described, and the particular way has, to my mind, a great bearing on the case—and for this reason. Mr. *Marten* says the Plaintiffs could enforce an injunction in this country. They could not enforce it against the Defendants personally—treating the company for the moment as a person—because the company and the other Defendant are both resident in *Ireland*, and there is no reason to suppose that they will in any way be found here. But he suggests that execution might be obtained against the Defendants' goods in this country. As I understand the practice of the trade as appearing on the affidavits, no goods of the Defendants ever come to this country at all. They execute orders for customers here, and remit goods which come here as the goods of the customers; and it seems to

me that there is nothing liable to execution by the Plaintiffs against the Defendants. That brings the case on that point directly within the case of *Marshall* v. *Marshall* (1) before the Court of Appeal.

As regards what may be called the Continental business, I think the only fair thing to do is to treat it as immaterial whether the action is an action in *Ireland* or in *England*. I see no reason why one should be more convenient than the other. At any rate, I will not pause to examine whether one would be more convenient than the other. But as regards the Irish business, it seems to me beyond doubt that the action ought to be and is an Irish action and not an English action, and that the proceedings ought to be in *Ireland* and not here.

In the first place, consider the matter of witnesses. It may be that the plaintiffs would have to take some witnesses over to *Ireland*. On the other hand, if the action proceeds in *England*, the Defendants would have to bring all their witnesses over here. Again, as regards the extremely important question in an action of this kind—discovery. If discovery is to be had against the Defendants, it must be had somehow or other in *Ireland*. The only place in which the books can be seen is in *Ireland*; and the examination of the books both for the purpose of the action and the trial, and still more for the purpose of account, if account is ordered, really goes to the root of the action. That, in my opinion, is an extremely strong reason for proceeding in *Ireland*.

Is not that conclusive, really, on the question of convenience? I turn to rule 2 of Order XI., and this is what I am to regard: "The comparative cost and convenience of proceeding in *England*, or in the place of residence of the defendant, or person sought to be served." I have not to regard the residence of the plaintiff; and though I think the rule does not by any means exclude regard to the convenience of the plaintiff, still, certainly, his convenience is not by any means to be the sole guide, for that would really be the equivalent for saying that he might choose his own forum. What the Court is to regard is the comparative cost and convenience of proceedings as regards both parties in reference to the general cost of the action—that is, the cost to

(1) 38 Ch. D. 330.

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both sides. The convenience, I think, ought certainly to include despatch as distinguished from delay. Now, regarding the case with reference to what I have already said about witnesses and about discovery, it seems to me that cost and convenience both point to *Ireland*, and not to *England*. *Ireland* is also the residence of the Defendants, which is a thing I am bound under the rule to regard. So that, whether I regard the case outside the rule on general principle, or according to the terms of the rule, I think this ought to be regarded as an Irish case and not as an English case.

Then there is an answer to that which requires some consideration, and that is the motion to rectify the register. I cannot consider that as conclusive in favour of the Plaintiffs, because there was a motion of a like character in *Marshall* v. *Marshall* (1), and it was not there regarded as sufficient to overrule the general convenience of remitting the case to *Scotland*. It is true, as was pointed out, that there it was a motion to put a mark on the register, while here the motion is to take it off; but, as at present advised, I think there is no substantial distinction between the two applications. I cannot, therefore, regard that as conclusive, but I am not at present sure that there is any reason why that application should be made here. I do not think I ought to decide that question. It is a question of jurisdiction arising on the *Trade Marks Act* which I had far better leave for decision when it really arises and calls for decision.

It is sufficient for me to say that I do not think the pendency of that motion, whether ultimately tried here or in *Ireland*, ought to interfere with the general convenience on other grounds of remitting the case to *Ireland*, or rather of declining to allow it to be tried here.

Therefore, I must grant the Defendants' application, and accordingly I discharge the order for service and set aside the service; and as that will get rid of the action altogether, so far as the Defendants are concerned, I think they must have their costs.

Solicitors: *Linklater & Co.; Paddison, Son, & Fullilove.*

(1) 38 Ch. D. 330.

G. I. F. C.

In re NORTH AUSTRALIAN TERRITORY COMPANY.

C. A. 1890 June 3.

Company — Winding-up — Examination of Witness — Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s.* 115 [*Revised Ed. Statutes, vol. xiv., p.* 227]—*Appeal by Witness from Order.*

The liquidator in the voluntary winding-up of a company, with leave of the Court, brought an action against another company, and obtained an order for affidavit of documents in the action; but the Court refused to order the production of documents, or the examination of the company's secretary on interrogatories, on the ground that in the present stage of the action, no defence having been put in, the discovery was premature. The liquidator then obtained an order under sect. 115 of the *Companies Act*, 1862, for the examination of the secretary before an examiner. The secretary did not appeal from this order, but when examined refused to answer a question relating to the matters in issue in the action:—

Held, that as the liquidator had shewn no reason for seeking the discovery except to assist him in the action, and so to evade the order of the Judge postponing discovery in the action, the witness was justified in refusing to answer the question.

Whether the witness might not have appealed against the original order for his examination, *quære*.

The *dictum* of the Judges in *In re Gold Company* (1) questioned.

THE *North Australian Territory Company, Limited*, was an English company, formed for the purpose of purchasing a large estate in *Australia*. The estate was the property of Mr. *Fisher* and his mortgagees, Messrs. *Goldsborough, Mort & Co., Limited* who were a company carrying on business in *Australia*, but with an office and secretary in *England*. The purchase-money payable to *Goldsborough, Mort & Co.*, was to be paid partly in debentures of the *North Australian Territory Company*. This was not done, and *Goldsborough, Mort, & Co.* brought an action in *Australia* against the *North Australian Territory Company* to enforce specific performance of the agreement for purchase.

On the 9th of August, 1889, the *North Australian Company* passed a resolution for a voluntary winding-up in this country, and a supervision order was afterwards made.

On the 7th of November, 1889, the liquidator of the company, with the leave of the Court, commenced an action in the name

(1) 12 Ch. D. 77.

C. A. 1890 *In re* North Australian Territory Company.

of the company against *Goldsborough, Mort & Co.* to set aside the agreement for purchase on the ground of misrepresentation. In this action an order was made by Mr. Justice *Kay* that Mr. *W. B. Hervey*, who was the secretary in *London* of *Goldsborough, Mort & Co.*, but was not named as a defendant in the action, should make an affidavit of documents in possession of the company; but it was directed that there should be no production of the documents till the further order of the Court.

The Plaintiff also took out a summons in the action for leave to deliver interrogatories for the examination of Mr. *Hervey* and of the English chairman of the Defendant company; but the application was dismissed by Mr. Justice *Kay*, on the ground that it was premature, as the defence to the action had not been put in.

The liquidator of the *North Australian Company* then obtained an order under sects. 115 and 138 of the *Companies Act*, 1862, for the examination of Mr. *Hervey* in the winding-up (1). Mr. *Hervey* attended for examination before the examiner. He stated, in answer to a question put to him on behalf of the liquidator, that letters had passed between the head office of *Goldsborough, Mort & Co.* in the colony and the *London* agency with reference to Mr. *Fisher's* property in *Australia*. He was then asked, "Did communications pass in the same way with reference to the formation of a company to purchase *Fisher's* property?"

(1) 25 & 26 Vict. c. 89, s. 115, is as follows: "The Court may, after it has made an order for winding-up the company, summon before it any officer of the company or person known or suspected to have in his possession any of the estate or effects of the company, or supposed to be indebted to the company, or any person whom the Court may deem capable of giving information concerning the trade, dealings, estate, or effects of the company; and the Court may require any such officer or person to produce any books, papers, deeds, writings, or other documents in his custody or power relating to the company; and if any person so summoned, after being tendered a reasonable sum for his expenses, refuses to come before the Court at the time appointed, having no lawful impediment (made known to the Court at the time of its sitting, and allowed by it), the Court may cause such person to be apprehended, and brought before the Court for examination; nevertheless, in cases where any person claims any lien on papers, deeds, or writings or documents produced by him, such production shall be without prejudice to such lien, and the Court shall have jurisdiction in the winding-up to determine all questions relating to such lien."

The witness objected to answer this question, and the examiner having given his opinion that he ought to answer it, the matter was referred to the Judge.

The liquidator accordingly moved, before Mr. Justice *Kekewich*, Mr. Justice *Kay* being absent from illness, that Mr. *Hervey* should attend at his own expense before the examiner to be further examined, and that he might be ordered to answer the question which had been objected to. The Judge made the order applied for, and Mr. *Hervey* appealed.

Latham, Q.C., and *Pollard*, for the Appellant:—

A witness summoned under the powers of the Act in the winding-up of a company is in a different position from a witness in an action. The liquidator is not entitled to ask the Court to exercise the powers given by the 115th section unless he can shew that the discovery which he requires is material to the winding-up of the company. Otherwise the section might be made the instrument of great oppression.

[FRY, L.J.:—You have not appealed from the original order for the examination of the Appellant.]

It was considered that he was precluded from doing so by the opinion expressed by the Judges in *In re Gold Company* (1). But although a person summoned as a witness may have no *locus standi* to appeal from the order to examine him, he may certainly object to questions which are not put for the purposes of the winding-up of the company, but to aid the company in their action against himself or a third party: *Heiron's Case* (2). The liquidator might have obtained leave to summon the Appellant before the action was brought against *Goldsborough, Mort & Co.*, and might have used the information gained to assist him in deciding whether to bring the action or not; but instead of that he first brought the action, and then having failed in obtaining the discovery he wants in the action, by reason of its being in the opinion of the Judge premature, he tries to override the decision of the Judge by getting the same discovery under this summons. This is an abuse of the powers given by the statute.

(1) 12 Ch. D. 77. (2) 15 Ch. D. 139.

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Renshaw, Q.C., and *C. E. E. Jenkins*, for the liquidator:—

The Appellant has not taken the proper mode of resisting the discovery. He has no *locus standi* to appeal against the order for examination; but he might have applied to the Judge either to limit the examination to particular subjects or to postpone it till after the defence in the action had been put in: *In re Imperial Continental Water Corporation* (1). With respect to the merits of the objection, there is no oppression or unfairness in pressing for discovery at the present time. The witness is not a party to the action, and the discovery will have to be given sooner or later. It is admitted that we could have examined the witness if no action had been brought; and the mere fact of our bringing an action cannot deprive us of our right. The order in this case does not go beyond those which have been made in similar cases: *Massey* v. *Allen* (2); *In re Metropolitan (Brush) Electric Light and Power Company* (3); *In re Contract Corporation* (4).

COTTON, L.J.:—

This is an appeal against an order which directs a gentleman, who is secretary of the Defendant company in *England*, to attend at his own expense and to answer the question which has been put to him, and which he declines to answer.

Now, is that order right? We have not now to decide whether a person summoned under the 115th section has or not any *locus standi* to appeal against an order which has been made under that section; but I do not express any opinion at all favourable to the view that he cannot in a proper case appeal against an order, because it seems to me it would be wrong to say, when a person is examined, not as a witness in an action, but for the purpose of giving information to the liquidator of a company, that if that order is wrongly made the person so summoned to be examined and to give information cannot appeal to the Court to know whether that order has been properly made or not. But here we have not that question. All that Mr. *Hervey*, who has been summoned to be examined, has done is this. When he

(1) 33 Ch. D. 314.
(2) 9 Ch. D. 164.
(3) 54 L. J. (Ch.) 253.
(4) 15 W. R. 245.

comes to a particular question he refuses to answer that question; and the Judge has compelled him to attend at his own expense and answer that question. I think there has not been sufficient regard to the section under which this order is made. The Court may, if it has made an order for winding-up, summon before it any officer or any other person; but then that is in the discretion of the Court, and, as I pointed out in another case which has been referred to, it is not at all the right of the applicant; it is the Court which may, if it thinks it right, order the person to attend and be examined and give any information he can with reference to the interests of the company being wound up. Here one comes to this point. There is a question put which is admitted to be simply put for the purpose of obtaining information in relation to the action which is brought by the liquidator of the company, whose secretary has been summoned under this section. It is very true that the secretary could not at first know what questions were to be put, and, in my opinion, if the Court sees that questions are being put which ought not to be put under the powers given by this section, it ought to interfere. As I understand, it is a general rule where liberty is given, not to the liquidator, but to a creditor or contributory, to examine under this section, that the Court should direct the special points to which the examination is to be confined. But it generally trusts the liquidator to put only such questions as are necessary in the interests of the company; and I should do so certainly unless it happened that in the opinion of the Court questions were being put which in the particular case ought not to be put by the liquidator. Here I do not say that these questions are not in the interests of the company being wound up with reference to the particular point—the conduct of the action; but so far as I can see they do not tend to assist the interests of the company in any way except by assisting it to get judgment in the action which has been brought by the liquidator.

What has been done? There has been an order obtained in the action by the liquidator as against the Defendant company requiring this secretary of the Defendant company in *England* to make an affidavit as regards documents; but no order for production has been made, that being reserved until a further stage;

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and there has been an application made by the Plaintiff company that the secretary and chairman of the Defendant company should answer interrogatories; but the Judge has held not only that it was premature to direct production, but that it would be premature until the further progress of the action to require the Defendant company by its officers to answer the interrogatories that were to be put to them. I agree with what was pointed out in the course of the argument by one of the Court, that this is really an attempt to act contrary to that order, and I think it ought not to prevail.

In my opinion, it would be wrong to allow the liquidator, by means of sect. 115, to get by a side-wind discovery and inspection which Mr. Justice *Kay* (and his orders have not been appealed against) has said it would be premature to give. I do not at all say that circumstances may not hereafter occur when it may be right for the liquidator to put this question. But the only question we have to consider is this: was Mr. Justice *Kekewich* right in requiring the secretary to attend and answer this question. I think he was wrong, and although all we shall do is to discharge the order made by Mr. Justice *Kekewich*, I express my opinion that under the existing circumstances it will not be right to put to the secretary, Mr. *Hervey*, who is being examined, any question relating to the matters in question in this action. It is not in any way suggested—certainly not in such a way as that we can attend to it—that this question can in any way benefit the interests of the company, except that it will be assisting the company to get judgment in the action which has been brought by them.

Bowen, L.J.:—

I am of the same opinion. The section which the Court is putting in force in the examination of a person under such circumstances is the section which places the decision as to an examination and as to its limits within the discretion of the Court. That being so, I do not think that we ought to attempt beforehand to classify all the occasions upon which it may be proper to make such an order, nor to classify or categorise all the occasions on which it may be unwise to make such an order.

We have no business to fetter the discretion of the Court in the future. But it does not follow from that that nothing can be said on the subject worthy the attention of those who have to put in motion this section.

In the first place, it must be observed that it is an extraordinary section. It is an extraordinary power; it is a power of an inquisitorial kind which enables the Court to direct to be examined —not merely before itself, but before the examiner appointed by the Court—some third person who is no party to a litigation. That is an inquisitorial power, which may work with great severity against third persons, and it seems to me to be obvious that such a section ought to be used with the greatest care, so as not unnecessarily to put in motion the machinery of justice when it is not wanted, or to put it in motion at a stage when it is not clear that it is wanted, and certainly not to put it in motion if unnecessary mischief is going to be done or hardship inflicted upon the third person who is called upon to appear and give information.

Having regard to those characteristics of this section which I have touched upon, I certainly should be loth to conclude that the witness—if I may call him a witness—the examinee, the person who is to be examined and against whom or upon whom the order has been served—has not a *locus standi* to complain that that order is oppressive or hard upon him; and though it is not necessary to decide one way or the other in this case, it seems to me that the point ought to be left open; because, as at present advised, there are some expressions of the late Master of the Rolls and Lord Justice *Baggallay* in the case of *In re Gold Company* (1), which seem to me at the first blush to go too far, and which seem to me indeed to be contrary to the decision in *Heiron's Case* (2). But I leave the point perfectly open, because it is not necessary to decide it now, and it is much better not to fetter the Court in the future by deciding that which is unnecessary; and for the same reason I abstain, like the Lord Justice who has preceded me, from attempting to lay down any hard-and-fast rules as to what ought to be the character of the occasions on which judicial discretion should be exercised to

(1) 12 Ch. D. 77. (2) 15 Ch. D. 139.

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make an order for the examination of witnesses under this section. I do not, as far as I am concerned, lay down as a hard-and-fast line that the concurrence of an action is a necessary bar to the exercise of the discretion of the Court under this section, though one cannot but see that the concurrence of an action begun by the liquidator is a matter which ought to be carefully considered by the Court in exercising its discretion on the subject.

In this case it seems to me to be sufficient to say (and it is on that ground that I decide this case) that at this stage this order to answer cannot properly be wanted for the purpose of the winding-up. The question, it is admitted (and it cannot be denied), goes simply in aid of the discovery which would be given in the action which the liquidator has instituted. There is an order for an affidavit of documents which has to be complied with on the 7th June next, and the actual production of documents is ordered to stand over. The summons for interrogatories was taken out and postponed, and, I doubt not, rightly postponed on the ground that it was premature, and that the issues in the action had not been sufficiently defined for interrogatories to be delivered, and that it would be time enough when the defence had been put in for interrogatories to be administered. Many of the interrogatories which otherwise would be administered might become wholly unnecessary if there was a little time taken and the defence was waited for before they were administered. The Court, therefore, in this very matter has thought that complete discovery was not wanted for the purpose of the action, even at this moment.

Now, if complete discovery for the purpose of the action is not wanted at this moment, *à fortiori* one would think it cannot be wanted for the purpose of the winding-up, it being admitted that the question here which is sought to be enforced goes simply in aid of the discovery which would be wanted in the action. It is impossible, therefore, to my mind to resist the inference that this question is simply sought to be pressed in order to give the go-by to the decision of the Court as to the postponement of the interrogatories and the non-immediate production of the documents; and it is really, when you read between the lines, or read

rather through the forms, an attempt to get discovery for the purpose of that action at a moment when the Court says it would be premature to insist upon it.

The learned counsel who argued this case on behalf of the Respondents asks us to infer that the liquidator had some mysterious and excellent reasons other than this for insisting upon the gentleman's answer, but he shews us none; and although it is not to be presumed that liquidators, who are officers and who have a duty to perform, will perform their duty recklessly unless the Court sees some reason to think they will, as they do sometimes, yet there is such a thing as overzeal in officers, and, having regard to the facts of the case which we do know, I do not for one moment hesitate myself to draw the inference, as I have said that this attempt to make the witness answer is simply an attempt to get discovery in that action at a time when the Judge thought it was not wanted. If so, it would be an abuse and an oppression to allow a witness so to be forced. He will give such discovery in time as is wanted in the action, and I say nothing as to any case which can be made either in aid of the action or otherwise as to employing this section should it be wanted for the purpose of the winding-up. It appears to me clear that at this stage this machinery is not wanted, and that it would be premature to use it in the way it is sought to be used and that it would be an oppression.

I believe that under the Act for taking evidence in foreign suits, 19th & 20th Vict. c. 113, and under the *Bankruptcy Act*, 1883, s. 27, it will be found that appeals have been successfully maintained against orders which the Judge has made.

Fry, L.J.:—

If I were not differing from the learned Judge of first instance I should probably only express my concurrence in the judgment of my learned brethren; but I think it right as I am so differing to say a few words for myself.

I entirely agree in what has been said as to the nature of this section of the Act. It is to be observed that it gives a power to the Court to summon a person before it, and the examination is taken, not under the 115th section, but under the 117th

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section, and that section enables the Court to examine upon oath the person either by word of mouth or by written interrogatories. The whole of the proceeding, therefore, is a proceeding by the Court, and the liquidator or the contributory or the other person whom the Court allows to intervene and to be active in the proceedings only does so by the leave of the Court, because he is a person supposed to have the means of addressing inquiries to the witness; but it is an entirely different proceeding from that in which a litigant summons a witness and examines that witness before the Court. The liquidator, therefore, in insisting, as he seems to me to have done in the argument before us, upon the right to any question, has, I think, entirely mistaken his position. Each question is put by the liquidator only by the leave of the Court, and on behalf of the Court.

Therefore, the whole of the question comes to this, whether, if I as a Judge were sitting and examining this witness with the information which has been given us on both sides, I should put this question to the witness and require him to make the discovery which would be involved in the answer to this question. What are the circumstances under which this man is brought before the Court? He is the secretary of a company which is the Defendant in an action brought by the liquidator. After the liquidation the liquidator, without thinking it necessary to examine *Hervey*, has (and no doubt by the leave of the Court) commenced an action against *Goldsborough, Mort & Co., Limited*, and he has obtained an order that these Defendants do by the aid of *Hervey*, on or before a day which is still to come, file a full and sufficient affidavit stating whether the company have any documents in their possession relating to the matters in question in the action, and further than that the Applicant (that is the Plaintiff, the liquidator) is to be at liberty to make such further application as to all or any of the documents mentioned in the affidavit, and as to the production thereof, as he may be advised. In other words, he is to have at a future day the statement of whether the company has these documents, and then the question with regard to their production is postponed for a future application. That is the way in which the learned Judge in the action instituted by the liquidator has exercised his discretion. Should I, as a Judge

in the winding-up sitting with this man before me, put a question which shewed that, instead of exercising the discretion in the same way, I was exercising it in a totally different way, and instead of requiring an affidavit to be made giving this full discovery on the 7th of June, I should require *Hervey* to state then and there whether there had been this correspondence? I should not have put that question to him, and I cannot help seeing that the liquidator has been endeavouring to induce the Court (Mr. Justice *Kekewich*, in this case) to exercise its discretion in a manner entirely at variance with the exercise of a like discretion by Mr. Justice *Kay* in the action.

I have spoken throughout as if Mr. *Hervey* were the same person as Messrs. *Goldsborough, Mort & Co.*, and I do so because he is the secretary in *England* of the English Board of Directors of that company. Of course it is manifest that he is examined in that character, and because the admissions which were very properly and fairly made by the Respondent's counsel at the bar satisfied me that those questions were put with a view to elicit the same information which is not to be obtained in the action until a later date.

Like my learned brethren, I do not propose to lay down, and desire entirely to abstain from laying down, any proposition which shall fetter the discretion of the Court which may be exercised from time to time under the 115th and 117th sections of the Act. I have no right to fetter the discretion of the Court in those cases; but one can see this plainly, that the question whether a man may be twice vexed with the same question may often be material, and the question whether the putting to him the interrogatory under the 115th section would be inconsistent with some order which had been previously made in the litigation between the same parties may again be material; and, therefore, in this case I think that the right discretion would be not to allow this question to be put. The witness, therefore, having refused to answer, he ought not to be directed to attend.

No doubt the Court has been very unwilling in a general way to interfere with the discretion of the learned Judge who has the conduct of the proceedings before him, and we feel that in the present case; but at the same time it appears to me that Mr.

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Justice *Kekewich* has proceeded on some notion of the right of a liquidator to obtain discovery under this section. I repeat in my judgment no such right exists. The right is that of the Court, and that of the Court only.

Therefore I agree with my learned brethren that the decision of Mr. Justice *Kekewich* must be reversed, and the summons dismissed with costs both here and below.

Solicitors for Appellant: *Freshfields & Williams.*
Solicitors for Respondent: *Saunders, Hawksford, Bennett & Co.*

M. W.

C. A. 1890 KAY, J. *Jan.* 27, 28, 29, 30. C. A. *June* 13, 14, 19, 20.

TILBURY *v.* SILVA.

[1889 T. 201.]

Copyholds—Enfranchisement—Fishing, Right of—Common, Right of—Right appurtenant—Profit à prendre—Custom—Prescription—Interruption—Acquiescence—Extinguishment—"Owners and Occupiers"—Indefinite Class—Right of Action—Legal Origin—Lost Grant—Presumed Grant—River—Soil ad medium filum—Grant—2 & 3 Will. 4, c. 71, ss. 1, 4, 6 [Revised Ed. Statutes, vol. vii., pp. 223–5].

The practice in a manor was for the lords to grant copyholds for three lives, and to renew at a fine upon the dropping of any of the lives; but there was no custom binding them to renew. The copyhold grants did not mention a right of fishing; but from time immemorial the copyholders had enjoyed a right of angling in a stream which formed the boundary of the manor, and of passing along the bank over the lands of other tenants of the manor for that purpose. Subject to this, the right of fishing was in the lords. In 1845 the lords enfranchised a copyhold belonging to *S.*, which adjoined the river, and released in the most ample terms all rights of fishing and all other rights they had over the enfranchised tenement. After this various other copyholds were enfranchised, and for nearly forty years the copyholders and the enfranchised copyholders exercised the same right as before of angling and going over the land of *S.* for that purpose. *T.* was the owner of several tenements formerly copyhold of the manor which had been enfranchised since 1845. In 1885 *S.* set up a gate and prevented *T.* from passing over his land to fish. *T.* acquiesced in the interruption until 1889, when he commenced an action, on behalf of himself and all other the owners and occupiers of copyholds or enfranchised copyholds, to establish the right of angling and of passing over the land of *S.* for that purpose:—

Held (affirming *Kay*, J.), that by the enfranchisement deed of 1845 the lords gave up all their rights over the land of *S.*, and that no reservation or exception of a power to make to other tenants grants giving rights over

that land could be implied, as there was no obligation on the lords to make such grants; that the rights given up included the reversionary right of the lords to grant rights of fishing on the expiration of the lives for which the copyholds were held; that the lords therefore had no power to give to *T.* by his subsequent enfranchisement deeds any rights over the land of *S.*, and that *T.* had no title to maintain the action; also that lost grants of the rights to the enfranchised copyholders could not be presumed. :—

Held also, *per Kay*, J., that the interruption of *T.*'s alleged right, acquiesced in by him, for four years before action brought, was a bar to that right under sect. 4 of 2 & 3 Will. 4, c. 71; and that such right, being in the nature of a profit *à prendre*, could not be claimed by prescription on behalf of a large and indefinite class such as "owners and occupiers."

Where a privilege has been exercised as of right for a long series of years, the Court will make every presumption in favour of its legal origin, but the circumstances of the enjoyment must be carefully looked to; and as in the present case there were copyholders whose right of way and of fishing was not disputed, the Court considered the case not to stand on the same footing as if the persons exercising the privilege formed only one class.

Per Kay, J.:—The general law of conveyancing — that, where a riparian owner, who is also owner of the soil under the river *ad medium filum*, makes a grant of his land on the banks of the river, the soil *ad medium filum* passes by the grant—applies to land of any tenure, whether freehold, copyhold, or leasehold.

Goodman v. *Mayor of Saltash* (1), as to presuming a legal origin for an immemorial usage, distinguished by *Kay*, J.

THIS was an action by the Plaintiff, "on behalf of himself and all other the owners and occupiers of ancient copyhold tenements, and of ancient tenements formerly copyhold but now enfranchised, of the manor of *Chilbolton*, in the county of *Southampton*," to establish the title of such owners and occupiers to a right of fishing with a rod and with a net called a shoe net in such part of the River *Test* as lay between *Testcombe* (otherwise *Titcombe*) *Bridge* and *Butcher's Mead*, and, as incident thereto, to a right of way along the banks between those two points.

The manor formerly belonged to the dean and chapter of *Winchester*, but in 1861 became vested in the Ecclesiastical Commissioners.

The custom of the manor was for the lords to grant the copyhold tenements for three lives. On the dropping of the lives it had been the practice to insert fresh lives on payment of a fine; but it was admitted that there was no custom binding the lords

(1) 7 App. Cas. 633.

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to renew the grants. The following was the form of a grant made in 1765: "At this Court the lords of the said manor granted in possession unto *A. B.*, and in reversion to *C. D.* and *E. F.*, by virtue of a warrant from the dean and chapter under their hands bearing date a messuage or tenement and two yard lands and a half, with the appurtenances, in *Chilbolton* aforesaid, to hold the said premises with the appurtenances unto the said *A. B.*, *C. D.*, and *E. F.*, for the term of their natural lives and the life of the longest liver of them successively, at the will of the lords, according to the custom of the said manor, yielding the accustomed rents, burthens, and services. And the said *A. B.* pays to the lords for a fine £ , and is admitted tenant and did his fealty, but the admissions and fealty of the said *C. D.* and *E. F.* are respited until and so forth." On the death of *C. D.* a fresh life was inserted by a grant in reversion to *X. Y.* after the death, surrender, or forfeiture of *A. B.* and *E. F.* In none of the grants was there any express mention of rights of fishing.

That rights of fishing such as were claimed in the action had from time immemorial been enjoyed by the copyholders was not in dispute, and they had also enjoyed as incident thereto a right of way for the purpose of fishing along the *Chilbolton* bank of the river, which, between *Testcombe Bridge* and *Butcher's Mead*, formed the apparent boundary of the manor. Subject to these rights, the right of fishing in the river was in the lords of the manor. Part of the adjoining land was waste of the manor. In 1838 an inclosure award was made which reserved "to the copyhold tenants of the said manor all such rights of fishery as they have hitherto lawfully used, exercised, and enjoyed in the said river *Test* from *Titcombe Bridge* to *Butcher's Mead*, with full liberty of ingress and egress for the purposes of fishing in, over, and upon the lands or grounds to be allotted or inclosed, and all the said proprietors or other persons signing such consent are made parties hereto for the purpose of further testifying such consent."

Among the properties allotted by this award to one *Charles Penton* in respect of his copyhold estate held under the dean and chapter, were the lands belonging to the Defendant to which the present action related, and which in part adjoined the river between *Testcombe Bridge* and *Butcher's Mead*.

By indenture dated the 5th of December, 1845, made between the dean and chapter of *Winchester* of the first part, the Copyhold Commissioners of the second part, and *Penton* of the third part, after reciting certain grants of the copyhold lands intended to be enfranchised (which lands included the land of the Defendant over which rights were claimed in this action), and that the dean and chapter had agreed with *Penton* under the *Copyhold Acts* for the enfranchisement of those lands, and for their release and discharge from the quit-rents, amounting to £16 3*s.* 8*d.*, and cert moneys amounting to 1*s.* 9*d.*, and all other rents payable to the dean and chapter in respect of the tenements, and from all fines, heriots, cert money, rights of timber, rights of soil, and the mines and minerals or quarries under the premises thereby enfranchised, rights, liberties, and privileges of hunting, hawking, fowling, and of chasing and killing game, and rights of fishing, and all rents, fealty, burthens, services, customs, and other manorial rights whatsoever, in consideration of the grant by *Penton* of an annual rent of £43 10*s.*, charged on the property to be enfranchised, and varying according to the price of corn as provided in the Acts: the dean and chapter, with the consent of the Copyhold Commissioners, enfranchised, granted, and released the property, "which are the lands, hereditaments, and premises, or part and parcel of the lands, hereditaments, and premises comprised in and held by the hereinbefore recited grants, or some or one of them," to *Penton*, his heirs and assigns, "together with all rights of common, and all and singular other rights, messuages and appurtenances to the said hereditaments and premises hereby enfranchised, or any part or parts thereof belonging or in any wise appertaining, and all ways, paths, easements and privileges whatsoever to the said lands, hereditaments, and premises belonging or appertaining, and all the estate, right, title, interest, claim and demand whatsoever of the said dean and chapter in, to, out of, or upon the said hereditaments and premises and every part thereof, with their appurtenances," to have and to hold the lands thereby intended to be enfranchised, with their appurtenances, to *Penton*, his heirs and assigns, for ever, to the intent that the copyhold tenure of such lands might be extinguished, and the said quit-rents and cert moneys, "and

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all other rents and all fines, heriots, rights of timber, rights of soil, and the mines and minerals or quarries under the said lands, hereditaments, and premises hereby enfranchised, rights, liberties, and privileges of hunting, hawking, fowling, and of chasing and killing game, rights of fishing, and all suits, fealty, burthens, services, customs, and other manorial rights incident thereto, or by custom, prescription, or otherwise howsoever to be paid, rendered, or performed to the lords of the said manor of *Chilbolton* for the time being for or in respect of the same premises, or any of them, may be absolutely released, extinguished, and discharged, to the use of the said *Charles Penton*, his heirs and assigns, for ever." There followed a grant by *Penton* to the dean and chapter of the rent-charge, which was the consideration for the enfranchisement.

The Defendant derived title, by purchase, under the above deed of enfranchisement.

The Plaintiff was entitled to five tenements, formerly copyhold, but afterwards enfranchised in favour of his predecessors in title, and he claimed a right of fishing in respect of each of them. The first tenement was enfranchised in 1853 by a deed, by which the dean and chapter conveyed the tenement, with "all hedges, ditches, fences, ways, waters, watercourses, liberties, privileges, rights of pasturage, commons, easements, advantages, and appurtenances whatsoever, common of pasture, and other commonable rights, to the said messuage lands, hereditaments, and premises belonging or appertaining." The second was enfranchised in 1859 by a deed, in the parcels of which were included "rights of fishing in the river at *Chilbolton* in the accustomed manner." The third in 1864, by the Ecclesiastical Commissioners, by a deed which included all liberties, privileges, easements, advantages, and appurtenants to the premises "appertaining, or with the same or any of them now or heretofore granted, occupied, or enjoyed or known as part or parcel of them, or appurtenant thereto." The fourth in 1870 by a deed similar to that of 1853. The fifth in 1871 by a deed containing words similar to those above mentioned as contained in that of 1864. The claim under the deed of 1853 was given up in the course of the argument, user in respect of that tenement not being proved.

At the time of the enfranchisement of the 5th of December, 1845, hardly any copyhold tenements had been enfranchised, but divers enfranchisements afterwards were made by the dean and chapter, and subsequently by the Ecclesiastical Commissioners, and at the time of the commencement of this action there were very few (according to the Plaintiff's answer, only three) copyholders remaining. The Ecclesiastical Commissioners declined to renew any copyhold grants. On the 31st of January, 1889, the Plaintiff issued the writ in this action on behalf of himself and the other owners and occupiers of ancient copyhold tenements, and ancient tenements formerly copyhold but since enfranchised, of the manor, alleging in his statement of claim that in or about 1885 the Defendant had erected gates upon his property and stopped the path along the bank, and refused to permit the Plaintiff and "the said other persons" to pass along the bank of the property for the purpose of fishing, and the Plaintiff claimed a declaration that the Plaintiff and the other owners of such ancient tenements as aforesaid were entitled as appurtenant to their tenements to a right of fishing with a rod and with a shoe net in that portion of the river which has been defined above, and, as incident thereto, to a right of way along the banks of that portion of the river for the purpose of angling and fishing.

The Defendant, by his statement of defence, stated that copyholders of the manor claimed to enjoy, and had in fact enjoyed, a right of fishing and a right of way such as were alleged by the Plaintiff, and that he, the Defendant, though he did not admit such right of fishing or right of way, had never interfered with, and did not intend to interfere with, the personal enjoyment of such rights on the part of the copyholders, of whom the Plaintiff was not one. He said he had not erected gates, but had erected a gate which might be freely used by any one who had a right of way along the bank in front of the property adjoining the river. He admitted that he refused to permit the Plaintiff to pass along the bank, and that he intended, unless stopped by injunction, to prevent the Plaintiff and all other persons having no right to do so from passing along the said property and from fishing from the bank.

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It was shewn by a mass of evidence that down to 1885, when the Defendant erected his gate, the owners of enfranchised copyholds had enjoyed the same rights of fishing as they had when copyholders; but since the erection of the gate or gates the Plaintiff, as he himself admitted in evidence, had not gone over the Defendant's land for the purpose of fishing, and the evidence shewed that he had in fact acquiesced in the interruption of his alleged right by the Defendant.

It appeared that the presentment by the homage of the manor of *Chilbolton* at the yearly manor court had always been in the following form: "We present the regality of hawking, hunting, fishing, and fowling belong to the lords of the manor; but the tenants have a right to fish with the angling rod and the shoe net from *Titcombe Bridge* to *Butcher's Meadow*."

A former owner of the Defendant's property, finding that the persons who came fishing trampled down his garden, laid out a regular path along the bank of the river. The time of his doing so was not distinctly made out, but it appeared to have been before 1859. This path had since been kept up.

The action was tried by Mr. Justice *Kay* on the 27th, 28th, 29th, and 30th of January, 1890.

Renshaw, Q.C., and *Stuart Moore*, for the Plaintiff, contended that the right of fishing, and the incidental right of passage for that purpose along the river bank on the *Chilbolton* side, were rights vested, either by custom or by implied grant, formerly in the tenants of copyhold lands abutting on the river, and, since enfranchisement, in the owners of those lands. [They cited *Halliday* v. *Phillips* (1); *Goodman* v. *Mayor of Saltash* (2); *Hayward* v. *Cunnington* (3); *Daniel* v. *Hanslip* (4); *Lathbury* v. *Arnold* (5); *Elton* on Copyholds (6); *Allgood* v. *Gibson* (7); *Brown* on Limitation (8); *Crowther* v. *Oldfield* (9); *Styant* v.

(1) 23 Q. B. D. 48.
(2) 7 App. Cas. 633.
(3) 1 Lev. 231; Sid. 354.
(4) 2 Lev. 67.
(5) 1 Bing. 217.
(6) Page 224.
(7) 25 W. R. 60.
(8) Page 199.
(9) 1 Salk. 364; 2 Ld. Raym. 1225; 6 Mod. 19; 1 Saund. (Ed. 1845, p. 349a; Ed. 1871, pp. 646, 647).

Staker (1); *Scriven* on Copyholds (2); *Johnson* v. *Barnes* (3); *Watkins* on Copyholds (4).]

Marten, Q.C., and *A. Young*, for the Defendant, contended that there had been an interruption, acquiesced in by the Plaintiff, for four years before action brought, which was fatal to the Plaintiff's claim by prescription; that the Plaintiff's claim, on behalf of himself and "other owners and occupiers of ancient copyhold tenements" of the manor, was a claim on behalf of an indefinite class, and a right by prescription could not be claimed on behalf of such a class; and that if any customary right formerly existed in the copyhold tenants it had been extinguished by the enfranchisements. [They cited *Gateward's Case* (5); *Parker* v. *Mitchell* (6); *Prescription Act* (2 & 3 Will. 4, c. 71), ss. 1, 4, 6; *Lowe* v. *Carpenter* (7); *Hollins* v. *Verney* (8); *Carr* v. *Foster* (9).]

Renshaw, in reply.

1890. Jan. 30. KAY, J.:—

Some very interesting questions have been raised in this case upon which, if I felt more difficulty than I do, I should have thought it right to consider my judgment; but the matter has now occupied some days, and I have had the opportunity of thinking over various points that have been raised. The Plaintiff sues on behalf of himself "and all other the owners and occupiers of ancient copyhold tenements, and of ancient tenements formerly copyhold but now enfranchised, of the manor of *Chilbolton*, in the county of *Southampton*"; and his claim is as follows. [His Lordship then read the paragraphs in the statement of claim asserting the Plaintiff's right of fishing in the River *Test*, from *Testcombe Bridge* to *Butcher's Mead*, and the incidental right of way along the river bank on the *Chilbolton* side between those points, and proceeded:—] Now, a claim of that kind may give rise to an infinite number of curious questions

(1) 2 Vern. 250.
(2) 6th Ed. pp. 283, 284.
(3) Law Rep. 7 C. P. 592; 8 C. P. 527.
(4) 4th Ed. vol. i. p. 452, n.
(5) 6 Rep. 59 b.
(6) 11 A. & E. 788.
(7) 6 Ex. 825.
(8) 13 Q. B. D. 304, 306, 313.
(9) 3 Q. B. 581.

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of ancient law of this country with respect to copyhold tenements, but not many of those questions need now be considered. The case before me has been dealt with in this way. [His Lordship then proceeded to consider the evidence in the case as to reputation or custom, shewing that as far back as 1823 owners of lands within the manor, formerly copyhold but since enfranchised, had enjoyed the right of fishing between *Testcombe Bridge* and *Butcher's Mead*, and also a right of passage for that purpose along the bank of the river on the *Chilbolton* side. His Lordship proceeded :—] I think the proper inference to be derived from the evidence is, that this river was a river which bounded the waste land of this manor, and that the boundary of the manor was the *medium filum* of the river, because it is agreed that no such right of passage on the bank on the other side, which is in the parish of *Wherwell*, ever existed for the *Chilbolton* tenants ; and, therefore, the division between the manor of *Chilbolton* and the land on the other side of the river would certainly be inferred to be the *medium filum* of this river. Now, it has not been shewn that in any grant of copyhold this right of fishing was expressly given. It seems to have been claimed as a customary right by the tenants of the manor, and presented by the homage at every manor court. [His Lordship then stated the position of the Defendant as purchaser of a piece of land abutting upon part of the river in which the alleged right was claimed, and read the allegation in the statement of claim that in 1885 he erected gates on his property, and so stopped the passage along the river bank. His Lordship proceeded :—] The evidence shews that the gates which the Defendant put up were gates which it would not be very easy to climb over; that he put them up for the purpose of stopping the passage of fishermen along his land on the bank of the river, and that the Plaintiff was effectually stopped, for he never went there at all for the purpose of fishing after those gates were put up. Therefore, the Plaintiff has been interrupted in the exercise of his alleged right, since, I must take it, the year 1885. The writ in this action was issued on the 31st of January, 1889—that is, four years after this interruption, in which, according to his own evidence, he acquiesced.

Now, so far as this claim relies on evidence of user, there are

two difficulties which seem to me quite insurmountable. One is that there has been an interruption confessed in the pleadings and shewn by the evidence to have been acquiesced in by this Plaintiff for four years before the action was instituted. Therefore, under the 4th section of the *Prescription Act*, evidence of user since the year 1829, interrupted four years before action brought, that interruption being acquiesced in, would not be sufficient to establish a prescriptive right. To prove a prescriptive right you must go back very much further. Here the only attempt to prove a prescriptive right under the Act is by evidence of user for that period of time. That seems to me of itself quite fatal to the claim of right by prescription under the statute.

There is another equally difficult point for the Plaintiff to get over, which is this—that he comes here claiming this right, not merely on behalf of himself, but on behalf of himself as a member of a class which he describes as "owners and occupiers of ancient copyhold tenements, and of ancient tenements formerly copyhold but now enfranchised, of the manor of *Chilbolton*." "Owners and occupiers" constitute a very large and indefinite class; and ever since *Gateward's Case* (1) it has been held that you cannot claim by prescription a right like this—which is a profit *à prendre*—on behalf of a large indefinite class of that kind. Such a claim cannot be maintained by prescription. Of course, reference has been made to the exception introduced by the case of *Goodman* v. *Mayor of Saltash* (2). That was a case in which certain persons claimed against a corporation a right of dredging for oysters; and there, the usage having been shewn to have existed as of right and without interruption in such a manner as would justify a claim by prescription, the Court felt themselves bound to refer that usage to some legal origin, and invented a most ingenious legal origin by supposing a grant to the corporation in trust for certain persons, the free inhabitants of ancient tenements within the borough. In that way they got over the difficulty which *Gateward's Case* had introduced, namely, that such a right could not be claimed by prescription. But here I have nothing of the kind. There is no possibility of inventing such a mode of escaping from the difficulty in this case as was invented in the

(1) 6 Rep. 59 b. (2) 7 App. Cas. 633.

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case of *Goodman* v. *Mayor of Saltash* (1). Here there is no corporation who could be trustee for this indefinite class of the right claimed. Therefore, the case does not seem to me to come within the exception which that authority has introduced. It seems to me that, for either of these reasons, a claim simply by prescription cannot possibly be maintained in this case.

But then, supposing that difficulty to be out of the way, could any other claim be maintained here? Of course, any other claim must depend upon an actual grant. Now, I assume for the moment that the Plaintiff has such an actual grant—which I am not at all satisfied of; however, I will assume that he has. The Plaintiff is now a freeholder; he has no copyhold at all; he is claiming this right in respect of tenements which were formerly copyhold, but have since been enfranchised and are now freehold. Now, he admits that none of those enfranchisements dates earlier than 1853. I will assume that those enfranchisements profess to grant a right of fishing in the River *Test* between *Testcombe Bridge* and *Butcher's Mead*, and a right of walking along the *Chilbolton* bank of the river for the purpose of that fishing, and a right of fishing with a rod or with a shoe net. How can that give a right against the Defendant? The Defendant claims under an enfranchisement which is dated the 5th of December, 1845. [His Lordship read the deed, and continued:—] The question is, what would pass by a grant such as is contained in this deed? As I have said, it is plain to me that the only possible inference is that the soil *ad medium filum* of the river belonged to the lord of the manor. Would that soil pass or not by such a grant as this? It is a law of conveyancing that, *primâ facie*, where a man grants land on the bank of a river, having himself the soil *ad medium filum*, without any words describing the boundary to be the *medium filum*, the soil *ad medium filum* passes by the grant. That is the general law. Is there anything in this case to restrict that? It is said there is, because the grant refers to the lands enfranchised as the lands comprised in the recited copyhold grants; and it is said that, when there is a copyhold grant of land on the bank of a river the soil of which *ad medium filum* belongs to the lord, the land under the water *ad medium filum*

(1) 7 App. Cas. 633.

will not pass under a copyhold grant. I simply deny that proposition; there is no decision in support of it. The general law, as I have stated it, is not a law which relates to freehold property only. It is a law by which you ascertain the parcel of a grant. It does not matter whether the land is copyhold, freehold, or leasehold. If it be bounded by a river, and the grantor has the soil *ad medium filum* of the river, you presume, in the absence of evidence to the contrary, that the soil *ad medium filum* of the river passes by the grant. I hold that this is a law which applies to copyhold land just as much as to freehold. Therefore, the words of this grant are not, in my opinion, restricted by the description in the parcels. The property granted by this deed is the property comprised in the copyhold grants. I should infer that a copyhold grant passes the land *ad medium filum* in the same manner as a freehold grant.

Therefore, that point does not assist the Plaintiff. I hold that the effect of this grant was to pass these plots of land on the bank of the river, and the soil of the river *ad medium filum* immediately opposite these plots of land granted, and that the boundary of these riparian plots on the river side was the *medium filum* of the river there.

Then how does the Plaintiff claim this right against the Defendant? After this grant the lord of the manor could maintain no such right: he could not come upon this land to fish in the river, nor could he claim any right of fishing in the river there. He has given up expressly all his rights of fishing whatever on this land, and it would be fishing on the land if, wherever he stood, he dropped a line into the water opposite this land *ad medium filum* of the river, because the land, as I have said, includes the soil under the river *ad medium filum*. Therefore, the lord could not do it.

Now, I will assume, for the purpose of the argument, that the Plaintiff had the right as a copyholder at the time when this grant was made. Of course, if a copyholder had the right of fishing and of passing along the bank to fish, the lord could not, by this enfranchisement, deprive him of that right.

But some years after this enfranchisement the predecessors in title of the Plaintiff took enfranchisements from the lord of the

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copyhold tenements in respect of which he is now claiming this right. It is beyond question that an enfranchisement by itself would totally destroy the copyhold interest, with all the customary rights attached to it; and he has pleaded this as a customary right. I cannot understand how he could have it in respect of his copyhold tenement other than as a customary right. It is analogous to a right of common on the waste of a manor.

I take it that this river was probably a river running along the waste of the manor, and therefore waste of the manor *ad medium filum* on the *Chilbolton* side; and just as the copyhold tenant by custom had a right of common upon the waste of the manor on the *Chilbolton* side of the river, so by custom he may possibly have had a right of fishing. I do not say whether he had or not—it is not material for me to decide that point—but I will assume it. It seems to me that, if he had it, he had it as a customary right.

Now, I have been extremely interested by a most ingenious argument of Mr. *Stuart Moore*, by which he has attempted to make out that this was not a customary right at all, but was a right which must be referred to some express grant which has not been found, and is like a right of common upon another waste which did not belong to the manor. The argument, if I rightly appreciate it, was this—that that kind of right would not necessarily be extinguished by the enfranchisement of the copyhold, because it would be like a right of way to the copyhold itself. It would be a thing attached, not to the estate of the copyholder, but to the land which he held. I am afraid I do not do justice to the very ingenious argument I have listened to, but that was, to my mind, the effect of it. Therefore, it is said, you must take this particular right of fishery as being a right, not attached to the estate of the copyholder—in which case it would have been extinguished by the enfranchisement—but as a right attached to the particular land—in which case the enfranchisement, it is argued, would not extinguish it.

I am sorry to say I cannot adopt that argument, because it seems to me that, if I did, I must find in every grant of this copyhold land, which was only for lives, a grant of the right;

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but, in point of fact, not one of the grants of this copyhold land contains a grant of the right of fishing. The homage did not claim it as having been granted to the tenants. They claimed it as a right; and, seeing the land was not the waste of another manor, but part of this manor, their only possibility of claiming it was as a customary right. It is a profit *à prendre* within the bounds of this very manor in which they were copyholders, and which they, as copyhold tenants, claimed by the presentment of the homage at every court. It is a custom or nothing; because, if it were a grant, they need not have claimed it in that way. The very fact of their claiming it in that way, at every court of the manor, shews that they had not got—as in fact they had not—an actual grant entitling them to it, and that they were claiming it just like a right of common by custom. So that I do not admit that, upon the enfranchisement of any one of these copyhold tenements, the right would remain. It would be like any other customary right attached to the estate of the copyholder. It would not exist after the enfranchisement unless it was re-granted. Of course, it might have been re-granted by the freeholder upon his making an enfranchisement; but then the fatal difficulty in the way of the Plaintiff is this—that every one of his enfranchisements was after the date of the Defendant's enfranchisement in 1845, and the lord had lost the right to grant, as against the land enfranchised in 1845 and the river opposite that land, any right of fishing, or any right of way whatever.

Therefore, upon that part of the case, the Plaintiff fails altogether; and I am bound to say that his case has not been made out in any way. Accordingly, the action must be dismissed with costs.

G. I. F. C.

C. A.

From this decision the Plaintiff appealed.

The appeal was heard on the 13th, 14th, 19th, and 20th of June, 1890.

Stuart Moore, *Harry Johnson*, and *G. W. Wallace*, for the appeal:—

Mr. Justice *Kay* has held that there could not be a legal origin to such a right as we claim; but the user is indisputable, and the

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Court will find a legal origin for it if possible. There is such a want of continuity in the copyhold tenure, that the right of the copyholders to fish can hardly be held to arise from custom. It seems better to hold the right of fishing to be annexed to the tenement, not to the copyhold estate in it, and to pass in each copyhold grant as parcel of the thing granted. The right of fishing claimed by the Plaintiff is a right appurtenant to each of his tenements. It is like a right of common, such as estovers, which, when created by grant, can be severed and granted to a stranger, so long as the extent or quantity of the right is certain, and the burden on the servient tenement is not increased: *Elton* on Copyholds (1); *Hayward* v. *Cunnington* (2); *Daniel* v. *Hanslip* (3).

We do not claim this right as a customary right, but we say that the user shews that it is appurtenant to the tenement, and therefore it was not destroyed by the enfranchisement: *Roe* v. *Briggs* (4); *Stammers* v. *Dixon* (5); *Duke of Portland* v. *Hill* (6). Evidence of user may be given to interpret the deed of enfranchisement, where there is an ambiguity, and the evidence here proves that the tenants' rights of fishing were not released to the Defendant. The effect of the enfranchisement was only to sever the *nexus* between the manor and the tenement. There is a release of all rights of sporting and fishing over the tenement, "to the intent that all manorial rights may be released." That means all the rights which the lord had in the tenement, not those which the tenants had. The lord had the right of fishing over the whole manor; he had a concurrent right with the tenants over this part. He gave up his concurrent right, not the right which the tenants had.

[FRY, L.J.:—Can any right which is incident to a copyhold by custom continue after enfranchisement?]

We submit that it can: *Swayne's Case* (7); *Emson* v. *Williamson* (8).

(1) Pages 221, 224.
(2) 1 Lev. 231; Sid. 354.
(3) 2 Lev. 67.
(4) 16 East. 406.
(5) 7 East. 200.
(6) Law Rep. 2 Eq. 765.
(7) 8 Rep. 63 a.
(8) Rolle's Ab. 933.

[FRY, L.J., referred to *Watkins* on Copyholds (1): "If a copyholder has common of pasture or estovers in right of his copyhold and the copyhold be enfranchised, the common is gone."]

That is not so as to a right annexed to the tenement and not to the copyhold estate in the tenement: *Elton* on Copyholds (2); *Crowther* v. *Oldfield* (3). Where after an enfranchisement there has been an uninterrupted enjoyment of an incident a Court of Equity will support a right to it: *Styant* v. *Staker* (4). We find here successive grants of the copyholds with their appurtenances, and we find the successive grantees exercising the right of fishing. The finding of the homage as to the customs is consistent with the view that the tenement had the right of fishing annexed to it, and that the lord granted the tenement with the right. The copyhold grants ought to be construed with reference to the actual exercise of the right. The right must be one attached to the tenement, not to the copyhold interest, as the tenure is so broken. Mr. Justice *Kay* held that the copyholder who held the Defendant's tenement was entitled to the stream *ad medium filum*, and that the enfranchisement, therefore, gave the grantee the freehold up to mid-stream; but there is no authority shewing that a copyhold reaches to mid-stream. In *Lord* v. *Commissioners of Sydney* (5), the point was raised, but only in the argument of counsel.

[COTTON, L.J.:—There is a presumption that a tenement reaches *ad medium filum*, which is wholly independent of tenure. How do you rebut this presumption?]

Duke of Devonshire v. *Pattinson* (6). It cannot be supposed that the lords intended to cut up their fishery by conveying the bed of the stream *ad medium filum* free from all fishing rights. The objection of Mr. Justice *Kay* that this is a suit on behalf of an indefinite class is answered by *Earl De la Warr* v. *Miles* (7). If the lords of the manor could on enfranchisement grant a right of fishing they have done so.

(1) Page 369.
(2) Pages 228, 229.
(3) 1 Salk. 364.
(4) 2 Vern. 250.
(5) 12 Moo. P. C. 473.
(6) 20 Q. B. D. 263.
(7) 17 Ch. D. 535, 585.

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[FRY, L.J.:—Your great difficulty is that the enfranchisement deed of 1845, under which the Defendant claims, does not reserve any power to the lords to grant fishing rights.]

The lords cannot be supposed to have intended to take away their right to make copyhold grants on the same terms as before. There is an implied reservation. Suppose the lord of a manor sells the waste, he cannot afterwards turn out cattle upon it; but he does not lose his right to re-grant the other copyholds with the same right of common as before: *Badger* v. *Ford* (1); *Swayne's Case* (2). According to the Defendant's contention, every copyholder could, after the enfranchisement of 1845, fish along all the bank except the part belonging to the Defendant. Then, when another enfranchisement was made, the remaining copyholders could fish except on the two enfranchised lots, and so on, diminishing the extent of fishing ground every time, which is a strange conclusion.

Marten, Q.C. (*A. Young*, with him), for the Defendant:—

The Plaintiff must make out his own title to sue; and that the remaining copyholders may have a right to sue will not help him. Now he, being an enfranchised copyholder, can only claim a fishing right by virtue of a grant of it to him by his deed of enfranchisement, which is subsequent to ours. Such a grant the lords had no power to make so as to derogate from their grant to us.

[BOWEN, L.J.:—Considering the evidence of continued user since 1845, ought we not to imply a reservation in the deed of that year?]

I submit not. The lords were under no obligation to renew, and no reservation ought to be implied, except a reservation of power to do what the copyholders had a legal right to call upon them to do. The words of the deed of 1845 are very ample, and shew an express intention to give up all rights of the lords present and future, including rights which would otherwise be saved by 4 & 5 Vict. c. 35, s. 82.

(1) 3 B. & Al. 153, 155. (2) 8 Rep. 63 a.

[BOWEN, L.J., referred to *Thomas* v. *Owen* (1).]

That case does not apply here, for this is not a right essential to the enjoyment of the property. *Marsham* v. *Hunter* (2), supports our case, and is approved in *Hall* v. *Byron* (3). The lords here were giving up all their rights, and the future rights annexed to their reversionary interest in the tenements on the determination of the copyhold grants were included. They, therefore, could not afterwards grant any rights over the Defendant's enfranchised copyhold. [He was then stopped by the Court.]

Stuart Moore, in reply.

COTTON, L.J.:—

This is an action brought by the Plaintiff on behalf of himself and all other the copyholders of the manor of *Chilbolton*, and the owners of properties formerly copyhold, but now enfranchised, to restrain the Defendant from keeping shut a gate across a path which leads by the side of the River *Test*. The Plaintiff claims that he, and those whom he represents, have a right of fishing on the river, annexed to which is a right to go down by the side of the river for the purpose of fishing. Undoubtedly the copyholders had, in connection with their copyhold grants, a right to fish in the river; and I will assume that they had a right, for the purpose of fishing, to go down by the side of the river over the ground of other copyholders. Part of the ground over which the path went was waste, and there would be nothing to prevent the lords of the manor, when they granted the right of fishing, from granting a right to go over that waste; but the copyholders claimed and exercised a right to go, for the purpose of fishing, over the land of other copyholders whose tenements adjoined the river. As far as we can see, that was a right by the custom of the manor; but to my mind it is not necessary to go into that question, because what we have to decide is, whether the Plaintiff, and those similarly circumstanced had, as against the Defendant, any such right after the execution of the enfranchisement deed

(1) 20 Q. B. D. 225. (2) Cro. Jac. 253.
(3) 4 Ch. D. 667.

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of December, 1845; and to my mind the question depends upon the true construction and effect of that deed. We have also to consider what effect we ought to attribute to user, subsequent to that deed, by persons who claim by subsequent grants from the lords of the manor.

What, then, is the true construction of this deed of 1845, which was executed by the then lords of the manor with the assent of the Copyhold Commissioners? It related to land now held by the Defendant, which at that time was copyhold, and no doubt its principal object was to relieve the Defendant's predecessor in title, and the land which he held, from all obligations consequent on its being copyhold. We find special reference to the rights from which the then copyholder wished himself and his land to be relieved, namely, the quit-rents, amounting to £16 3*s.* 8*d.*; "cert moneys," amounting to 1*s.* 9*d.*; and other rents payable to the lords in respect of the tenement, and "all fines, heriots, and cert moneys, rights of timber, rights of soil, and the mines, minerals, or quarries under the said lands, hereditaments, and premises hereby enfranchised, and all the privileges of hunting, hawking, fowling, and of chasing and killing game, and rights of fishing." The lords of the manor then grant the lands with their appurtenances to him to the intent that the copyhold tenure of the same lands, hereditaments, and premises may be extinguished, and the said quit-rents of £16 3*s.* 8*d.*, and cert money of 1*s.* 9*d.*, and all other rents, &c., and the mines and minerals, or quarries under the said lands, hereditaments, and premises hereby granted, rights, liberties, and privileges of shooting, hawking and fowling, and chasing and killing game, and rights of fishing, may be for the time being released and extinguished." That language is very clear, and would prevent the lords from in any way exercising, as against the land, or against the purchaser of the land, any of those rights to the prejudice of the land enfranchised. In my opinion, that is the true effect of the deed. But it is urged that the deed was not meant to extend to any right which the lords had to grant to other persons in future this right of fishing, including the right to go over the land which was being enfranchised. In my opinion, the lords at that time not only had the right to go and fish there—which, of course,

they gave up—but they had in them and could extinguish the reversionary rights of re-granting the copyholds with a right of fishing, and of going for that purpose over the land when the existing leases for lives fell in. I do not see how we can, or how we ought, to cut down the meaning of the words of the deed, when we see that the intention was to relieve the tenant *Penton*, so far as the lords could do so, from any right of fishing, and of coming on his land for that purpose.

But it is said we ought to imply a reservation to the lords of a right to re-grant the copyholds with the same rights of fishing as before. It is not necessary to decide that question. What we have to consider is, whether the Plaintiff and other persons who claim under enfranchisement deeds executed long after the deed of 1845 can claim the right which they now claim against the Defendant. They are really the only persons we have to deal with, for I understand that the Defendant does not contest the right of those who are holders of copyholds under grants for lives existing at the time of his enfranchisement, and we have not to deal with any claim by copyholders. We have only to deal with persons, like the Plaintiff, who have taken enfranchisements. Now, the effect of these enfranchisements has been to put an end to all such rights as they had as copyholders. They contend now that the right claimed by them was not a customary right, but was something different. If it was not a customary right it must have depended on a grant by the lords; and, in my opinion, the Defendant's enfranchisement deed prevented the lords from granting again that right by any deed which they were not bound to execute.

But then we have to consider the facts which have been proved before us as to the user, after enfranchisement, of fishing powers by the persons who were enfranchised. It was urged that from that user we ought to imply a reservation to the lords of a right to make grants of fishing powers *de novo*. In my opinion, we ought not to do so, when on the terms of the deed itself, which are clearly expressed, there is no indication of any such reservation, and when that reservation would be inconsistent with the grant made by the lords. In my opinion, although there was, no doubt, considerable user of fishing powers and rights of way over the

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land of the Defendant, yet we ought not from that to infer that, contrary to the terms of this deed, there was a reservation to the lords of a power of granting such rights *de novo*.

Then we have to consider whether upon that user since 1845 we can infer any other right or origin of right upon the part of the Plaintiff. What are we asked to do? Are we to infer a grant to the Plaintiff individually? That is not the case which has been made. It has never been suggested that there was a grant made by the Defendant or his predecessors in title to the individual Plaintiff; and, in my opinion, it would be wrong to assume that there had been a grant by the Defendant or his predecessors in title to the individual, when he claims only in respect of a general right existing, as he says, in him and all those who are, or have been, copyholders. There could be no such grant by the Defendant to such a body as is represented here by the Plaintiff. Although, if there has been a long and uninterrupted user, we ought, if we can, to attribute to that user some legal origin, I think that we cannot give effect to a right said to have existed in a body of copyholders and to continue when they are enfranchised. In my opinion, therefore, the appeal fails.

I give no opinion at all as regards those persons who are still copyholders, and who may have had re-grants since 1845. It is hardly possible that any case will arise as to them, as the now lords of the manor never grant any renewals; but if any point of that kind should arise, it will be dealt with when it arises.

BOWEN, L.J.:—

There is no doubt that it is the principle of the English law to suppose a legal origin for long-established user—to assume that there is some justification to be found for acts of open enjoyment which have continued as long as the memory of living people extends; and, in the present case, I wish to explain that we are in no way departing from or infringing this principle of law.

Looking at the matter apart from the documents, there is here a mass of evidence of user, from which one can plainly see that during the whole memory of living people persons have been in the habit of going over the premises of the Defendant and

fishing in the river, in exercise of an assumed right of way over those premises for the purpose of fishing. Far from not applying to this case the principle of the common law which I have mentioned, I start, and I think my learned brother started, by assuming that there must have been some legal origin to explain this long-continued enjoyment. Now, what legal origin are we to assume? I am ready to assume the legal origin in the way most favourable to the Plaintiff's case. I think that the origin of this long enjoyment was a custom of the manor, by which the lords when they granted a copyhold for lives annexed to it the right to fish in the river, with the right for that purpose to go along the river on the premises belonging to the other copyholders. I think that is the truth; but if it pleases the Plaintiff better that I should assume, then I will assume, that there is something short of a customary right, and that by the habitual practice of this manor, though it did not amount to a custom, the lords used from time to time to annex to each tenement as they granted it a right of the same description, and that the grants to each were made in such a way as to enable the lords to do that. But, in either view, this right of fishing over the several tenements along the river came from the lords, and it was only in virtue of the grant from the lords that anybody could enjoy it. Still, it existed. As I said before, if the only thing we had to consider in this case was, whether there was a legal origin for the enjoyment, I think the Plaintiff would have made out his case. But that does not decide the present action, because we have a deed of 1845, which, according to the construction which we are asked by the Defendant to give to it, displaced and extinguished the right over the Defendant's land. The Defendant says, "Whatever may have been the rights in this place and along this river from time immemorial down to the year 1845, in the year 1845 my predecessor in title obtained the freehold of this land by a deed one of the very terms of which was to release the land and those who held it for ever from the servitude or obligation to submit to this user on the part of others." When the deed is produced we have to construe it, and see whether, assuming such a legal origin as I have indicated, that right which existed over this land was not finally abolished in the year 1845.

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It has been suggested (I will not fully discuss the matter, because I do not think it necessary in the present case) that we must construe the deed of 1845 by the light of the user. Of course we must construe it by the light of the user which preceded it; but it is said that we also ought to construe it by the light of the subsequent user, and there is, no doubt, a body of evidence which shews that after the deed of 1845, as well as before, there was an enjoyment of some fishing amenities (I will not call them rights, because that is what we have to decide) over the *locus in quo*. Now, with regard to the application of the evidence of acts of subsequent user to the construction of the deed, I do not propose to examine *de novo* the proposition which was considered in the *Duke of Devonshire* v. *Pattinson* (1), for the simple reason that you cannot adduce evidence to contradict the provisions of the deed, and the doctrine of that case cannot possibly apply if the language of the deed is clear and its construction is plain. Now, in my opinion, the language of the deed of 1845 is clear and precise, and these rights, which I assume to have existed, were destroyed by that deed. If the right existed at all it was a right which existed in the lords. If it was a customary right it still was a right which emanated from them. As, then, this deed of 1845 in terms extinguished all the lords' right of fishing, it can only be by virtue of one of two constructions that this right can subsist after that deed, namely, either that the words of the deed do not cover it, or that there is an implied reservation in the deed which reserves to the lords the power of re-granting in respect of copyhold tenements, even upon their enfranchisement, the same rights as they had been accustomed to grant before.

With regard to the proposition that this is not a right which is expressly mentioned by the deed of 1845, I cannot see anything to support it. The exclusive right of fishing was vested in the lords, and it was by virtue of their having that right that they were enabled, either by the custom of the manor, if it was a customary right, or by virtue of the practice of the manor, to make grants of such a right to the copyhold tenents. When they extinguished all their rights over the Defendant's land, they must

(1) 20 Q. B. D. 263.

have extinguished the right of fishing so far as they themselves had any beneficial interest in it, and the only exception which, so far as I can see, ought to be implied in the deed is an exception which would reserve to the lords any rights which they were bound not to part with because they were bound to make grants of them to others. If it be urged that there is an implied reservation to the lords of a right to re-grant all those enjoyments to others which they were bound by custom or otherwise to re-grant, the answer is, that the lords were not bound by custom or otherwise to re-grant the copyholds at all. But, as I said, I will take the right of way in a manner which is most favourable to the Plaintiff, and I will assume that the right of fishing and the ancillary right of way were not customary rights, but that by long practice the lords had granted these tenements with the appurtenances in such a way as to annex the rights of fishing and rights of way to the copyhold tenements during the continuance of the estate granted. But if the re-granting the copyholds was a mere practice, there certainly was no right as against the lords to have that practice continued. This, as has been pointed out by the Lord Justice, is not a case of copyholders of a manor insisting upon their rights against the Defendant, but of a person who himself claims under a deed of enfranchisement subsequent to that of the Defendant.

But still we have not got rid of the whole case by saying that this right was destroyed in 1845, because it is possible for a destroyed right to recover its existence. In that case, however, it would be a new right, although the enjoyment would be the same. But are we entitled from the user in question, which has taken place since 1845, to assume that a right of this kind has been re-created since 1845? We have not been asked to assume that by Mr. *Stuart Moore* or his able junior, and, I think, for the best of all reasons, viz., that they could not ask us to do so with any hope of success. Though long enjoyment is a ground for presuming a legal origin, and a lost grant may be presumed to support long enjoyment, still before making such a presumption we must examine the enjoyment most carefully with regard to its circumstances. We are not now considering a case of immemorial enjoyment—a case of a series of acts continuing from

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time out of mind for which it is the duty of the Court to strain every nerve to find a legal origin: we are examining the case of a user which must be confined to the last forty-five years. The first observation to be made about that user is that it may to a great extent be explained by the fact that in 1845, and for many years afterwards, there were, and in fact there still are, copyholders of the manor the continuance of whose rights would explain acquiescence on the part of the owners of the servient tenements in the acts which were unquestionably done over them. It is a very different thing when you find that acts of enjoyment done to the detriment of a tenement were done only by persons who had no long-established and admitted right to do them; in which case you must either assume the enjoyment to be wholly wrongful, or, on the other hand, adopt the alternative that it is based upon some grant from the owner of the servient tenement. In this case unquestionably many people had a right to go over this land for the purpose of fishing in the year 1845 and for some years afterwards. All copyhold tenants of the manor who held under grants made before 1845 had an undisputed right to go there, and I will assume that, as Mr. *Moore* urged, the copyhold tenants to whom re-grants had been made also had the right to go. Now, very few of the copyholds were enfranchised till after 1852, so that for years after 1845 there was a numerous body whose right to go over the land was not disputed. That explains a good deal of the user, and renders it less necessary for us to draw the inference, which is always a violent one, of a lost grant, especially as we are not asked to do so, and as we know, from matters to which I am going to refer, that in all probability there could not have been a lost grant.

If there was a lost grant by the Defendant, to whom was it made? To the Plaintiff? That is not the Plaintiff's case. He does not say there was a grant made to him which he has lost, nor was his evidence addressed to raising that inference, but to proving user by a number of persons. He, therefore, wants a lost grant to himself and others, and his evidence does not shew the kind of user which would support the idea of a lost grant to himself. Then, if not a lost grant to himself, a lost grant to whom? A lost grant to all the enfranchised copyholders in

turn? If we are to find a legal origin commensurate with the user since 1845, we have to presume a succession of lost grants to I do not know how many people. Are we driven to do that? I think not. If it was a case of immemorial enjoyment from time out of mind for which we were asked to find a legal origin, I would strain a point to find it; but what we have to deal with is a user since 1845, and there is nothing to justify us in making such a violent presumption as that there is a lost grant either to the Plaintiff or to any other person. To imagine such a grant is really an absurdity, and that, no doubt, is the reason why Mr. *Stuart Moore* and his junior did not ask us to deal with it.

The judgment of the learned Judge below, therefore, must be affirmed, on the ground that such legal right as existed in this instance was destroyed by the deed of 1845.

FRY, L.J.:—

Like the Lords Justices, I have been anxious to know fully the real facts of this case, that we might endeavour, if possible, to find some legal origin of this enjoyment; but, like them, I have come to the conclusion that the Plaintiff's claim cannot be supported.

In my judgment, the whole case turns upon the deed of the 5th of December, 1845, under which the Defendant claims. Before I state the view which I take of the effect of that deed, I must pause to observe that it appears to me, according to the best view of the facts of the case, that the right of fishing was in the lords of the manor, subject, with regard to existing copyholds, to the rights which by custom or otherwise were then vested in the copyhold tenants, that all those copyhold tenancies were for lives and lives only, and that there was no custom which required the lords to renew; subject therefore to the existing rights of the copyholders the whole rights of fishery were in the lords.

Now, that being the state of circumstances, the enfranchisement deed of 1845 is executed to Mr. *Penton*. By this deed, after reciting the copyhold grants under which Mr. *Penton* claimed, the lords convey all the lands, and, in addition, all rights of common and all other rights belonging to the

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hereditaments, "and also all the estate, right, title, interest, claim, and demand whatsoever of the lords of the manor into, out of, or upon these hereditaments, and every part thereof." In my judgment, amongst the rights, estate, or interest which the lords of the manor at that time possessed was the right of fishing and going over the land for the purpose of fishing and a right of re-granting rights of a similar character which were then enjoyed by the existing copyhold tenants. There was nothing whatever, as it appears to me, either in law or in equity to prevent the lords of the manor from granting to Mr. *Penton* rights which they but for this grant might have granted out to other copyhold tenants. If there had been any obligation by custom or otherwise which lay upon the lords at that time with regard to those rights, I should construe this deed as not affecting them; but it appears to me that it does convey every right in the land which the lords were not restrained by some legal or equitable obligation from granting, and amongst those rights appear to me to have been the rights of fishery at that time enjoyed by the copyhold tenants which would become the rights of the lords when those tenancies had expired.

What follows in the deed confirms that conclusion. The intention expressed is, in the first place, the extinction of the copyhold tenure, and in the next place the extinction of all right of fishing over the land. How that deed can be construed in any other way than as releasing that right, I confess I do not see. If that is the true construction of that deed, it follows that neither by a subsequent copyhold grant nor by a grant of freehold by enfranchisement or otherwise, could the lords of the manor derogate from the grant of 1845. In my judgment any grant which they might subsequently make of a right of fishing, and of a right of going upon the Defendant's land for the purpose of fishing, whether contained in a re-grant of the copyhold, or in a conveyance of the freehold, would be a right granted in derogation of the deed of 1845. That, in my judgment, puts an end to the whole of the Plaintiff's argument.

We, however, thought it right to consider a point which was not urged upon us, viz., whether, as there has been from 1845 downwards, a great enjoyment of the right of fishing partly by

the copyhold tenants, and partly by those who claim under enfranchisement deeds subsequent to that of the Defendant, we ought not to find a legal origin for that enjoyment. Upon that point I have come at precisely the same conclusion as my learned brethren, and it appears to me to be impossible to say that there is in this case anything which would justify us in inferring a grant from the Defendant to the Plaintiff of a right of fishing or of a right of way over the Defendant's land. We must consider, not only as Lord Justice *Bowen* has put it, to whom we should be bound to presume grants by the Defendant, but from what class of persons grants must be assumed. The Plaintiff's claim is a claim to fish from *Titcombe Bridge* to *Butcher's Mead*, over a long stretch of the river, and it is obvious that if the Plaintiff is to have that right he must claim it under grants, not from the Defendant only, but from the other riparian proprietors along that stretch of river; and, therefore, we have to multiply the grants, not merely by the persons to whom we must presume them to have been given, but of the riparian owners in that stretch of river, and that such grants, if they ever existed, should all have been lost would be a remarkable fact. But, again, we must look a little more in detail at the actual facts of this case, because it is conceivable that the Plaintiff might make out a case for himself alone. He claims under five rights of fishing. With regard to the tenement enfranchised in the year 1853, it was admitted that no right of fishing is proved. As regards the tenement enfranchised in the year 1859, we have evidence of not quite twenty years' user under this deed. The grant of 1845 would not enure to take away the rights which were vested in the Plaintiff or his predecessors in title at that time, and therefore it is not until the enfranchisement of 1859 that the point arises. There is, therefore, not twenty years' user, and, as I have already pointed out, the difficulties of assuming grants which would legalize that user to have been made and to have been all lost are very great. My mind certainly was very much impressed with the fact of the making of the path; but that path appears to have been made before any of the enfranchisements were executed under which the Plaintiff claims any right, for that path must, I think, be taken to have been made before 1859.

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The maintenance of the path is accounted for by the existence of a number of copyhold rights, which are not even now wholly extinguished, and under which persons therefore had a right in the year 1845, and still have those rights, which they exercise.

I think, therefore, looking at all the circumstances of the case, that it is impossible to infer any grant either to that class of persons for whom the Plaintiff claims or to the Plaintiff himself, and in every point of view, therefore, the Plaintiff's case fails, and the appeal will therefore be dismissed with costs.

Solicitors: *E. F. & H. Landon; Kearsey, Hawes, & Walsh.*

H. C. J.

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In re ROPER. TAYLOR *v.* BLAND.

[1879 R. 46.]

Further Consideration—Order to pay Costs out of Cash in Court—Adjustment of Costs at time of Distribution.

A testatrix bequeathed a mixed fund of pure personalty and money to arise from realty directed by her will to be sold, to *A.* for life, and then to a charity. In a suit to administer the estate, an order on further consideration was made, which directed the costs of suit and certain legacies to be paid out of four sums of cash in Court, two of which arose from realty, and two from pure personalty, so far as they would extend, the deficiency to be raised out of a sum of stock in Court which represented realty. There was no reservation of subsequent further consideration nor of the question how the costs should ultimately be borne. The dividends on the residue of the fund were ordered to be paid to *A.* for life with liberty to apply. On *A.*'s death the testatrix's heir-at-law petitioned for the payment of the fund to him as being realty. The Attorney-General, for the charity, objected that the costs of administering the real estate ought to have been paid out of the proceeds of real estate, in which case there would have been left a substantial sum of pure personalty which the charity could take. *Kay*, J., considered that the order on further consideration settled the question how the costs were to be borne, and ordered payment of the fund to the heir. The Attorney-General appealed:—

Held, by *Cotton* and *Bowen*, L.JJ., that the costs of administering the realty ought to have been paid out of the proceeds of realty, and that as the order on further consideration contained no declaration as to the ultimate incidence of the costs and did not indicate any intention to

decide that question, the application of the sums of cash in payment of costs and legacies must be treated as directed for convenience without any intention to alter the rights of the parties, and that as the fund was still in hand, the Court, although there was no express reservation of the ultimate incidence of the costs, ought now to set the matter right:

Held, by *Fry*, L.J., that an order on further consideration which directs payment of costs in a particular way, and does not reserve subsequent further consideration nor reserve the question how the costs are ultimately to be borne, ought to be treated as final.

Sheppard v. *Sheppard* (1) considered.

THIS was an appeal by the Attorney-General from an order made by Mr. Justice *Kay* upon the hearing of a petition when he treated and distributed a fund of £2898 8*s.* 9*d.* New Consols in Court to the general credit of the action, as being or representing real estate only, it being contended on behalf of the Attorney-General, that a portion of such fund was or represented pure personal estate applicable towards payment of a charitable bequest.

The action was for the administration of the real and personal estate of *Hetty Roper*, who died on the 16th of May, 1878, having by her will, dated the 8th of August, 1877, appointed the Defendants her executors and trustees, and (*inter alia*), devised to them (subject to the payment of a certain capital sum, as to which no question arose) a house and lands upon trust for sale, and directed her executors to receive the proceeds of sale, and thereout, first, to pay the expenses incident to the execution of the preceding trusts, her funeral and testamentary expenses, and debts; secondly, thirdly, and fourthly, to pay three legacies of £200, £100, and £100 for certain charitable purposes; fifthly and sixthly, to pay certain pecuniary legacies; and seventhly, to invest the residue in Government securities, together with all moneys or notes of hand, securities for money, that might be in her possession at the time of her decease, as well as rents falling due prior to the sale of the land, and to pay the income to her two sisters, *Caroline Taylor* and *Louisa Roper*, during their joint lives, and to the survivor of them during her life; and the testatrix directed her executors immediately after the decease of such survivor to sell the said funds and apply the proceeds,

(1) 33 Beav. 129.

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first, in payment of the expenses incident to the execution of the preceding trust; secondly and thirdly, in payment of two legacies of £300 each; and fourthly, to give the residue to the vicar, churchwardens, and overseers of the poor of the parish of *Fordham*, upon trust, to invest the same in Government securities, and apply the dividends arising therefrom for the benefit of the sick and afflicted poor of the parish of *Fordham*.

The testatrix had no impure personal estate. *Louisa Roper* died before the order made by Vice-Chancellor *Bacon* on further consideration, dated the 29th of July, 1880, which contained a declaration that the legacies of £200, £100, and £100 given by the testatrix for charitable purposes out of the proceeds of the above house and lands were void, and resulted to the heir-at-law—and a declaration that the personal estate of the testatrix was primarily liable to the payment of "the debts, funeral and testamentary expenses." The order then directed taxation of the costs of the action, including the charges and expenses properly incurred by the Defendants the executors as trustees relating to the administration of the testatrix's estate, and after directing the payment into Court to the general credit of the cause of certain balances of £424 15*s.* 9*d.* and £287 3*s.* 2*d.* by the executors, and of a sum of £340 10*s.* by *J. S. Fletcher*, ordered that so much of the £4134 4*s.* 3*d.* Consols in Court to the credit of the action as with £60 14*s.* 5*d.* cash in Court to the same credit and the before-mentioned balances of £424 15*s.* 9*d.* and £287 3*s.* 2*d.*, and the sum of £340 10*s.* directed to be paid into Court when so paid in, would raise the costs when taxed, and the total amount which should be certified to be due in respect of certain pecuniary legacies given by the will, and also of a legacy of £19 19*s.* given by a codicil, which last-mentioned legacy, therefore, was payable out of the general personal estate, and two sums amounting together to £76 3*s.* 9*d.*, payable to *Caroline Taylor* and the representatives of *Louisa Roper* in respect of interest on a legacy, should be sold, such costs, legacies, and sums paid, and the income of the residue of the funds paid to *Caroline Taylor* for her life. General liberty to apply was given.

Of the sums mentioned in the order on further consideration,

the £4134 4*s.* 3*d.* Consols represented the proceeds of sale of the house and lands; the £60 14*s.* 5*d.* cash arose from dividends thereon; the £287 3*s.* 2*d.* was the balance on the account of rents and profits; the £424 15*s.* 9*d.* the balance of the general personal estate account; and the £340 10*s.* was the principal and interest due on a promissory note to the testatrix. The costs, charges, and expenses were taxed at £747 13*s.* 1*d.*, and the ultimate balance of New Consols remaining after carrying out the directions of the order on further consideration was £2898 8*s.* 9*d.*

By indenture dated the 20th of April, 1882, *Frederick Roper*, the heir-at-law of the testatrix, assigned the £2898 8*s.* 9*d.* New Consols to *M. T. Whitehall* absolutely, subject to the life interest of *Caroline Taylor*.

Caroline Taylor died on the 8th of January, 1890; whereupon *Whitehall* and *Frederick Roper* presented a petition praying that the fund in Court might be sold, and that the residue of the proceeds, after payment of the costs of the petition, and of the two legacies which were payable on the death of *Caroline Taylor*, and of legacy duty, might be paid to *Whitehall*.

The petition came on to be heard before Mr. Justice *Kay* on the 1st of March, 1890.

Mulligan, for the Petitioners:—

The fund in Court represents the proceeds of sale of the real estate of the testatrix, which, on the death of the tenant for life, devolved on the heir-at-law of the testatrix. Any question arising on the construction of the will is precluded by the terms of the order on further consideration, by which the rights of the parties were finally determined. The declaration contained in the order as to the primary liability of the personal estate was not inserted merely for convenience of administration, but was a positive finding, in the presence of the parties, that the whole of the testamentary expenses, including therein the costs of the action, was payable out of the personal estate, and that the proceeds of sale of the real estate were to be resorted to only in the event of the personal estate being insufficient. That was the basis on which the order proceeded, and according to which the rights of the parties were worked out.

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Ingle Joyce, for the Attorney-General :—

Upon the true construction of the will the whole of the testamentary expenses were properly payable out of the proceeds of sale of the real estate. But if it is not open to contend that, in view of the order on further consideration, at all events the costs of the action, so far as they were occasioned by the administration of the real estate, ought to be borne by the real estate, and there is nothing in the order on further consideration to prevent this. The expression "testamentary expenses" in such an order ought to be read as confined to testamentary expenses in the strict sense of the term, and not as including the costs of the action. The result of the authorities is that testamentary expenses include only the ordinary costs of an administration action, and not such costs as increased by administration of the real estate.

[KAY, J. :—I do not so read the authorities. The costs may be apportioned; but that is not because they are not testamentary expenses, but because it is unfair that the personal estate should bear all the costs of the action.]

There is no case to shew that costs of administration of real estate come under the designation of testamentary expenses: *Theobald* on Wills (1); *In re Middleton* (2). The order on further consideration was not a final application of the proceeds of the real estate.

KAY, J. :—

I have listened with attention to Mr. *Ingle Joyce's* ingenious argument; but I feel myself completely bound and fettered by the order made on further consideration, which is one that I, at any rate, am bound to follow; and I think his only chance of obtaining the relief which he asks—if he is entitled to it, as to which I give no opinion—is by going to the Court of Appeal. The testatrix in this case left certain real estate which was to be dealt with under the will by selling it, and the words which follow the direction to sell are these. [His Lordship referred to the terms of the will, and continued :—] The argument is that there is an express direction to apply the proceeds of the sale of

(1) 3rd Ed., p. 576. (2) 19 Ch. D. 552.

the real estate in payment of funeral and testamentary expenses and debts. It is said that that direction would extend to the whole of the testamentary expenses, including all the costs of this action; but that, at any rate, according to the modern practice of the Court, the costs of the action, so far as they have been increased by the administration of the real estate, ought to be paid out of the proceeds of the real estate, and only the other costs of the action out of the proceeds of the personal estate; and if that were done the effect would be that there would be a surplus of the pure personalty which would go to the ultimate legatee under the seventh head, which is a charity; if not, the whole of the personalty will be absorbed in payment of the funeral and testamentary expenses and debts and the costs of the action, and there will be nothing for the charity. That is the result. Before I enter upon that interesting question and apply my mind to it, I have to deal with the circumstances. This case, on the 29th of July, 1880, came on for further consideration before this Court, in the presence of counsel, and, amongst them, Her Majesty's Attorney-General, who was there representing the charity, and in the order on further consideration I find this declaration. [His Lordship read the declaration as to the primary liability of the personal estate, and continued:—] That was because there was a certain amount of pure personal estate, and the Attorney-General was interested on behalf of the charity to say that the testamentary expenses must be apportioned, so far as they consisted of the costs of the action; but in his presence this order was made, not providing for any such apportionment. But it is said that that is not conclusive, because "testamentary expenses" in that clause may not mean costs of the action; but then, a little later on, this follows. [His Lordship referred to the terms of the order as to sale of a portion of the £4134 4*s.* 3*d.* Consols and payment of costs, and continued:—] So that, on the face of this order I find what the Court meant by "testamentary expenses." This follows exactly the direction that the personal estate is first to be applied, and then the proceeds of the realty, because the £4134 4*s.* 3*d.* Consols was proceeds of the real estate, and only so much was to be sold and applied as with what remained of the proceeds of the personal estate was

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necessary to satisfy the costs of the action and remaining legacies. Accordingly, I have not merely the declaration, but I have the mode in which the Court understood its own declaration—and I must assume the Attorney-General understood it also—made clear on the very face of this order. "Testamentary expenses" in that declaration did include the costs of the action; and the costs of the action were to be provided for first of all by having recourse to what remained of the personal estate, and by eking out the necessary sum by applying only so much of the proceeds of real estate as was required. I therefore find myself completely bound by this order to say that the costs of the action were included in the declaration. Accordingly, if that declaration is to be altered, it must be not by me but by the Court of Appeal. I am now asked by the assignee of the heir-at-law to order that the fund in question should be paid to him, and it seems to me that, subject to the payment of any costs remaining unpaid, that must be so.

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An order was therefore made according to the prayer of the petition.

Against this order the Attorney-General appealed. The appeal came on for hearing on the 5th of June, 1890.

Ingle Joyce, for the Appellant:—

But for the form of the order on further consideration no difficulty would arise, it being well settled that costs occasioned by the administration of real estate ought to be borne by the real, and not by the personal estate. All that the declaration in the order on further consideration meant was, that the general personal estate was not exonerated by the direction in the will to pay the expenses incident to the execution of the trusts, funeral and testamentary expenses and debts out of the proceeds of the house and land. "Testamentary expenses," in an order of the Court, mean "testamentary expenses," properly so called, and do not include costs of suit, which, if intended to be included, would have been expressly mentioned. Even if the words "testamentary expenses" do include some costs of suit, they do not mean that the costs of administering realty are to be

borne by personalty: *Patching* v. *Barnett* (1). At all events, the words "personal estate" in the declaration cannot be meant to apply to specifically bequeathed personalty, such as moneys or notes of hand, securities for money, in the testatrix's possession at the time of her decease. The judgment of the Court below was based on the erroneous view that each of the four sums (other than the £4134 4*s.* 3*d.* Consols) out of which the costs were directed to be paid by the order on further consideration was personalty, whereas, in fact, two of them are realty. All the sums dealt with stood to the general credit of the cause, and the order on further consideration did not, in fact, make any distinction founded upon the source from which the sums dealt with had respectively arisen, but merely directed payment out of cash first, and then (if necessary) out of proceeds of sale of stock—otherwise some of the stock would have had to be sold, and some of the cash invested, and unnecessary brokerage and expense thus incurred. There was no necessity at the time to distinguish between the several sums, inasmuch as the income of the whole was payable to the same person for her life, and the order on further consideration left open the question as to what should be done with the fund after the death of the tenant for life, and there was no declaration as to the validity or otherwise of the charitable gift in question of the residue of the fund. It is true the order does not contain any words to shew that the direction for payment of costs was to be without prejudice to the question as to how such costs should ultimately be borne as between realty and personalty; but there was no argument upon the point, and the declaration was never intended to decide it. In any case, the direction as to costs in the order on further consideration is not conclusive as to the rights of the parties (*Sheppard* v. *Sheppard* (2)), and the Court will not now deprive the charity of its legacy, even if there were an oversight in the drawing up of the order on further consideration.

Warmington, Q.C., and *Mulligan*, for the Respondents, the Petitioners:—

"Testamentary expenses" include costs of suit (*Harloe* v.

(1) 51 L. J. (Ch.) 74.

(2) 33 Beav. 129.

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Harloe (1)), and must be construed to do so here. The order on further consideration is conclusive of the rights of the parties. The Attorney-General was represented by counsel when it was made, and any objection on his part ought to have been made then, and is too late now: *Peareth* v. *Marriott* (2). In effect this appeal seeks to reconstitute, after a lapse of ten years, a fund which has been already exhausted by the order of the Court. In *Sheppard* v. *Sheppard* (3) the Court did not disturb anything that had been done as to the funds which had already come in.

Ingle Joyce, in reply.

1890. June 23. COTTON, L.J.:—

This is an appeal of the Attorney-General, representing a charity.

The case arose in this way. There was a fund in Court when the petition was presented which had undoubtedly arisen from real estate, and which, though given to a charity, could not go to the charity, and an order was made on the petition giving the fund to the assignee of the heir-at-law, who took by intestacy in consequence of the charity being unable to take real estate. But the Attorney-General urges, that what was given to the charity consisted partly of personal estate and partly of money arising from the sale of real estate, and that the portion of the costs attributable to the administration of the real estate ought to be paid out of the real estate; whereas, in fact, they have been paid so as to exhaust the whole of the personal estate: and he asks for an inquiry to ascertain how much of the costs, which ought to have been paid out of the real estate, has, in fact, been paid out of personal estate comprised in the gift. That seems to be right, for it has not been disputed that as a general rule the costs of administering real estate ought to be borne by the real estate; and if they are so borne in this case, there will be something left for the charity.

Then why is it said to be wrong that an inquiry such as the

(1) Law Rep. 20 Eq. 471. (2) 22 Ch. D. 182.
(3) 33 Beav. 129.

Attorney-General asks for should be directed. It was argued that there had been a declaration in the order on further consideration which threw the costs on the personal estate. I do not think that the true meaning of that portion of the order; and certainly it was not so understood, because, as far as I can understand, the order for payment of costs was not in accordance with that view when the payments into Court directed by the order on further consideration had been made. There were in Court five funds—a sum of stock which had arisen entirely from real estate, and four sums of cash, two of which had arisen from real estate, and two from personal estate. Then, without any reference to the order in which those funds were to be applied, there was an order which would exhaust for payment of costs and legacies all the four sums of cash which I have mentioned, and which required a certain sum to be added by sale of a portion of the £4134 4*s.* 3*d.* stock in Court, which had arisen from real estate. I think that the declaration cannot be held to apply to personal estate, which was specifically disposed of by these words in the will: "Together with all moneys, notes of hand, securities for money, which may be in my possession at the time of my decease as well as rents falling due prior to the sale."

There is another question which deserves more consideration, and it is this. The order which directed payment of the costs in the way I have mentioned was an order on further consideration, and it is said that therefore it must be taken to have decided ultimately the rights of the parties, and so, as it exhausted the personal estate, all the rest must go to the heir-at-law who took the real estate. That was undoubtedly a strong argument; but if we see on the true construction of this order that there was no intention whatever to decide the rights of the parties, I do not think that the mere fact that this payment of costs was directed by an order on further consideration ought to prevent the Court from setting the matter right where there is a fund in hand enabling it to do so. I agree that an order on further consideration ought to settle the rights of the parties, and I also think that the Attorney-General ought, when the action came on for further consideration, to have asked the Court to insert in its order what, if asked, it certainly would have inserted—a statement

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that the order for payment of costs was without prejudice to the question out of what fund the costs were to be finally paid. That, unfortunately, was not done, and we have to consider what effect ought to be given to this order as it stands.

Mr. *Ingle Joyce* referred to *Sheppard* v. *Sheppard* (1), where Lord *Romilly* laid down in very wide terms that a direction for payment of costs could not be taken in any way to decide the rights of the parties, and the case really stood over that we might discover, if we could, whether that was a general declaration, or only one referring to that particular case. We have looked at the petition which was presented there, and I should say that Lord *Romilly* was making too wide a statement in laying down that an order for payment of costs out of a particular fund is not to be taken as deciding the rights as between persons entitled to the fund when it comes ultimately to be divided. We must look at the order and see whether it was the intention, at the time of directing that certain costs should be paid out of a particular fund, to decide that they were to be ultimately borne by that fund. Here, although there is a declaration that certain legacies given to charities out of the testatrix's real estate were void, and that the amount of those legacies passed to the heir-at-law, we find no declaration at all as regards this fund which now remains. When the order on further consideration was made the same person was entitled to the income both of that part of the fund which consisted of real estate and that which consisted of personal estate, and the order contained no direction what was to be done after the death of the tenant for life, nor any declaration as to what would ultimately become of this fund, such direction or declaration not being necessary at that stage. I can then only look upon this order as taking those funds which were most readily available for payment of the costs and legacies, without considering whether they arose from real estate or from personal estate, leaving entirely untouched and not making any declaration upon the question what fund should, as between the parties who were ultimately to be entitled to the different funds, be held liable to the costs. I think it would be wrong in the absence of any declaration of the rights of the parties to hold

(1) 33 Beav. 129.

that by that order the Attorney-General is precluded from claiming anything on behalf of this charity, when there would have been something which he could have claimed if the costs relating to the real estate had been paid, as I think they ought to have been paid, out of the real estate.

In my opinion, therefore, the Attorney-General is entitled to the inquiry which he asks, there being still in Court a fund which will be clearly sufficient to set the matter right. I think the charity ought not to lose its legacy because the Attorney-General made, as I think he did, a slip in not raising or asking the Court to reserve the question when the matter was on for further consideration, out of what fund these costs ought ultimately to be paid. I think there should be an inquiry what portion of the costs has been improperly, under the circumstances, paid out of the personal estate, and that the amount should be recouped out of the proceeds of real estate.

The question then comes as to the costs. The learned Judge below directed all the costs to be paid out of the fund, and that we do not disturb. As to the costs of the appeal, I think that, although we decide in favour of the Attorney-General, we cannot give him any costs, since probably there would have been no conflict at all if the question how the costs were ultimately to be borne had been reserved, as the Master of the Rolls, in *Sheppard* v. *Sheppard* (1), said it ought to be.

BOWEN, L.J. :—

I am of the same opinion.

FRY, L.J. :—

Unfortunately, I am unable to agree with my learned brothers in their view of this case.

We have here an order made on further consideration when the whole of the proceedings in the action were before the Court, and it was known how much of those proceedings related to realty and how much to personalty. The Court then made an order dealing with the whole costs of the suit, and directed them

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to be paid out of certain funds. It appears to me that the way in which the order deals with the costs and with the funds indicates something like an arrangement between the parties to the litigation not to work out their rights with extreme exactitude, because, there being five funds to be dealt with, the Court deals with them in this way. In the first place, there are four funds consisting of cash, two of which arise from personalty and two from realty; and, in the next place, there is a sum of stock representing realty. The Court then directs the application of the four funds without regard to whether they arose from personalty or realty in payment of three things, viz., the whole of the costs without reference to whether they relate to realty or personalty, the balance of the legacies, and a sum of £76, one part of which went to *Caroline Taylor* and the other part to the representative of a *Louisa Roper*. All those sums are directed to be paid out of the four funds without regard to their origin, and then any deficiency of those four funds to pay the three sums was to be raised out of the £4134 stock which represented the proceeds of realty. No liberty to further discuss the incidence of any of these sums was reserved, and therefore we have an order on further consideration which reserves no second further consideration—an order which deals with the costs, and in which no point is reserved. Such an order as that is, in my humble opinion, final with regard to the costs, and I do not think it is competent to any of the litigant parties to come subsequently under the liberty to apply and to ask for an order which shall vary the incidence of the costs. I have already observed, that on such an occasion the whole matter is before the Court, and, according to my view of the practice of the Court of Chancery and the Chancery Division, it has always finally dealt with costs on further consideration unless express liberty has been reserved for further discussion, and that course is, I think, one of great convenience. I think, that if in the absence of a reservation of a right to raise this point it can still be raised, the order is converted into a trap. In the present case the Respondent has actually purchased the interest of the heir under this order, without notice of any intention to raise the point, and then he finds that part of the fund purchased is

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to be taken away from him. Now, so far as my memory enables me to speak, I have never known a case in which such a thing has been done by the Court of Chancery. I have never known a case in which, where an order on further consideration has dealt with the costs and directed them to be paid out of a particular fund without reserving liberty to alter their incidence, they have afterwards been ordered to be paid out of another fund. Therefore, although I cannot help under the circumstances mistrusting my own judgment, yet, as I have a strong opinion of the inconvenience of the course now pursued, I am bound to express my concurrence with the learned Judge below. I may add, that in *Sheppard* v. *Sheppard* (1) there does not appear to have been any order on further consideration.

COTTON, L.J. :—

It does not appear that there had.

Solicitors: *W. Horsley; Hare & Co.*, for *Solicitors to the Treasury.*

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[1888 R. 2380]

Charity—Administration—Charity School—Managers—Dismissal of Schoolmaster—Injunction—Leave of Charity Commissioners before commencing Action—4 & 5 Vict. c. 38, *s.* 17 [*Revised Ed. Statutes, vol. viii., p.* 924]—*Charitable Trusts Act*, 1853 (16 & 17 *Vict. c.* 137), *s.* 17 [*Revised Ed. Statutes, vol. xi., p.* 986].

The master of a charity school founded under 4 & 5 Vict. c. 38, brought an action in the Chancery Division against the managers of the school for an injunction to restrain them from dismissing him from his office, and from appointing any other person to such office, and from ejecting him from the school-house. The managers had purported to dismiss the Plaintiff under the discretionary power conferred upon them under sect. 17 of the Act; and the question raised by the action was whether the managers had been properly appointed. The Plaintiff had not obtained, under sect. 17 of the *Charitable Trusts Act*, 1853, the leave of the Charity Commissioners to bring the action.

Held, by *Bowen* and *Fry*, L.JJ., *dissentiente Cotton*, L.J. (reversing the

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decision of *Kay*, J.), that although the action might incidentally involve the consideration of the deed of trust of the charity, it was not such an action as required the consent of the Charity Commissioners.

And *held*, by the whole Court of Appeal, that, even if the consent of the Charity Commissioners were necessary, it was not necessary to obtain it before the commencement of the action, and that it would not be right to dismiss the action without giving the Plaintiff the opportunity of ascertaining whether the Commissioners would give their consent.

Glen v. *Gregg* (1) explained.

THE Plaintiff, a certificated teacher, alleged by his statement of claim that he was appointed head master of the National School at *Allerton Bywater*, *Yorkshire*, in 1882, and entered into possession of the school-house by virtue of such appointment. The school was a charity school, and was founded under a deed of 1867, executed pursuant to 4 & 5 Vict. c. 38—an Act for affording further facilities for the conveyance and endowment of sites for schools—and to the explanatory statute of 7 & 8 Vict. c. 37, a piece of land being conveyed to the use of the Archdeacon of *Craven* and his successors upon trust to permit the premises to be used for a school as therein mentioned, and as a residence for the teacher. And the deed contained the following provision: "It is hereby declared that the selection, appointment, and dismissal of the school-teachers shall be in all respects under the control and management of the incumbent and his curate, and of four other persons to be nominated annually by the incumbent."

On the 18th of September, 1888, the Defendants, the Vicar of *Allerton Bywater* and four other persons, acting as the managers of the school, sent the Plaintiff a notice that three months from that date his services as teacher in the school would not be required.

The Plaintiff alleged that, in consequence of certain invalid appointments, some of the Defendants were not managers of the school at the date of the notice of dismissal, and had no power or authority to remove him from his office; also that, if they were managers, they had dismissed him improperly. Accordingly, on the 12th of December, 1888, he issued the writ in this action, claiming an injunction to restrain the Defendants, or any of them, from removing or dismissing him from his office of school-

(1) 21 Ch. D. 513.

master, and from electing or appointing any other person to the said office, and from ejecting him from the school-house or premises occupied by him in virtue of his said office.

The action was commenced without the leave of the Charity Commissioners having been previously obtained by certificate under sect. 17 of the *Charitable Trusts Act*, 1853. By their defence the Defendants alleged that their position as managers was recognised by the Plaintiff before his dismissal, and that he was dismissed for valid and sufficient reasons, and in the *bonâ fide* exercise of their discretion under sect. 17 of the statute 4 & 5 Vict. c. 38. They also raised the objection to the Plaintiff's right to sue that he had not first obtained a certificate from the Charity Commissioners authorizing him to bring his action; and they counterclaimed that the Plaintiff might be ordered to repay to them all sums properly expended by them in consequence of his refusal to give up possession of the school-house and premises, and all sums received by him as school-pence and otherwise from the children attending the school, which the Defendants said the Plaintiff had improperly retained.

The action now coming on for trial, the Defendants raised the preliminary objection that leave to bring the action had not been obtained from the Charity Commissioners.

It appeared that the Defendants had since the commencement of the action taken proceedings before the justices of the peace, under sect. 18 of 4 & 5 Vict. c. 38, to obtain possession of the school-house, but that the justices adjourned the application until the present action had been disposed of.

The action was heard before Mr. Justice *Kay* on the 11th of February, 1890.

Renshaw, Q.C., and *Decimus Sturges*, for the Defendants:—

This being a suit in Chancery relating to a charity and the property thereof, the Plaintiff should, before commencing it, have obtained the leave of the Charity Commissioners to do so under sect. 17 of the *Charitable Trusts Act*, 1853 (1).

(1) 16 & 17 Vict. c. 137, s. 17: "Before any suit, petition, or other proceeding (not being an application in any suit or matter actually pending) for obtaining any relief, order, or direction concerning or relating to any charity, or the estate, funds, property, or income thereof, shall be commenced,

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This is not a mere action to prevent us from excluding the Plaintiff from his office and house, in which case it might be argued that, being in the nature of an action at law, it did not come within the section: *Benthall* v. *Earl of Kilmorey* (1); *Holme* v. *Guy* (2). This suit really relates to the administration of the charity, and is therefore clearly within the section. Under sect. 17 of 4 & 5 Vict. c. 38, the Plaintiff, on being appointed schoolmaster, only "held his office at the discretion of the trustees," and that discretion we say we have exercised.

In *Glen* v. *Gregg* (3) your Lordship allowed a similar objection to the present. In that case the question was whether a building registered as a place of meeting for religious worship was exempted from sect. 17 of the *Charitable Trusts Act*, 1853, by sect. 62, and your Lordship felt bound by the decision of Lord *Chelmsford* in *Attorney-General* v. *Sidney Sussex College* (4) to

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presented, or taken, by any person whomsoever, there shall be transmitted by such person to the said board, notice in writing of such proposed suit, petition, or proceeding, and such statement, information, and particulars as may be requisite or proper, or may be required from time to time, by the said board, for explaining the nature and objects thereof; and the said board, if upon consideration of the circumstances they so think fit, may, by an order or certificate signed by their secretary, authorize or direct any suit, petition, or other proceeding to be commenced, presented, or taken with respect to such charity, either for the objects and in the manner specified or mentioned in such notice, or for such other objects, and in such manner and form, and subject to such stipulations or provisions for securing the charity against liability to any costs or expenses, and to such other stipulations or provisions for the protection or benefit of the charity, as the said board may think proper; and such board, if it seem proper to them, may by such order or certificate as aforesaid require and direct that any proceeding so authorized by them in respect of any charity shall be delayed during such period as shall seem proper to and shall be decided by such board; and every such order or certificate may be in such form and may contain such statements and particulars as such board shall think fit; and (save as herein otherwise provided) no suit, petition, or other proceeding for obtaining any such relief, order, or direction as last aforesaid shall be entertained or proceeded with by the Court of Chancery, or by any Court or Judge, except upon and in conformity with an order or certificate of the said board. Provided always, that this enactment shall not extend to or affect any such petition or proceeding in which any person shall claim any property or seek any relief adversely to any charity."

(1) 25 Ch. D. 39.
(2) 5 Ch. D. 901, 905.
(3) 21 Ch. D. 513, 517.
(4) Ibid. 514, n.

hold that the building was not exempted from sect. 17; but the Court of Appeal held that the latter case should not be treated as a deliberate decision of Lord *Chelmsford*, and they accordingly held that the building was exempted from sect. 17.

[KAY, J., referred to *Brittain* v. *Overton* (1).]

Cutler, Q.C., and *H. Lynn*, for the Plaintiff:—

This case, which is the converse of *Holme* v. *Guy* (2), is as much a common law action as that action was, though in form it is an action in Chancery. It is an action which, before the *Judicature Act*, 1873, could not have been brought in Chancery. Being in substance a common law action, it is not within sect. 17 of the *Charitable Trusts Act*, 1853: *Holme* v. *Guy*. The Act which applies to this case is the *Charitable Trusts Act*, 1860. Under sect. 13 of that Act the trustees of the charity may take summary proceedings before the justices for the removal of a schoolmaster, and for obtaining possession; and they may enforce the warrant of the justices under the provisions of 1 & 2 Vict. c. 74, which Act is incorporated in that section. If the trustees have obtained the warrant wrongfully, the latter Act enables the schoolmaster to bring an action for trespass against them. The present action is really a Common Law action for trespass of that kind, and should be treated as such. At all events, if it should be held that this action is within sect. 17 of the Act of 1853, then we ask that the trial of the action may be allowed to stand over for the leave of the Commissioners to be obtained, as was done by your Lordship in *Glen* v. *Gregg* (3), and by Lord *Chelmsford* in *Attorney-General* v. *Sidney Sussex College* (4). That would be in accordance with the latter part of sect. 17, which says that no suit "shall be entertained or proceeded with" without the leave of the Commissioners. The language of that part of the section differs from that in the earlier part, and evidently contemplates leave being obtained to "proceed with" an action that may have been commenced without leave. The Court is not bound to treat this as an abortive action merely because leave has not been obtained, but will do what is necessary to render it

(1) 25 Ch. D. 41, n.
(2) 5 Ch. D. 901.
(3) 21 Ch. D. 513.
(4) Ibid. 514, n.

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useful: *Hodgson* v. *Forster* (1). *Benthall* v. *Earl of Kilmorey* (2) is really in our favour, for all that the Plaintiff asks is an injunction to prevent the Defendants from excluding him from the school, and the Court of Appeal held that, if the action asked nothing beyond that, the leave of the Commissioners was not necessary. *Brittain* v. *Overton* (3) was held to be within sect. 17, because it was an action for administration of the trusts of the charity, which this action is not.

KAY, J.:—

I think this objection involves a very important question. The object of the 17th section of the *Charitable Trusts Act*, 1853, was, it is plain, to prevent the property of a charity being wasted by suits in Chancery or proceedings under *Sir Samuel Romilly's Act*, by petition, or other like proceedings to obtain "any relief, order, or direction concerning or relating to any charity, or the estate, funds, property, or income thereof;" and in order to interpose an effectual bar to proceedings of that kind, it provided that, before any such suit, petition, or other proceeding "shall be commenced, presented, or taken, by any person whomsoever, there shall be transmitted" to the Board of the Charity Commissioners notice in writing, and the Board, "if upon consideration of the circumstances they so think fit, may, by an order or certificate signed by their secretary, authorize or direct any suit, petition, or other proceeding to be commenced, presented, or taken with respect to such charity," and so on; "and (save as herein otherwise provided) no suit, petition, or other proceeding for obtaining any such relief, order, or direction as last aforesaid, shall be entertained or proceeded with by the Court of Chancery, or by any Court or Judge, except upon and in conformity with an order or certificate of the said board."

Now in this case a suit has been commenced in Chancery, and it asks for an injunction. That is the main object. The main and principal object of this proceeding is to obtain an injunction to restrain the Defendants from removing or dismissing the Plaintiff from his office of schoolmaster of the *Allerton Bywater*

(1) W. N. 1877, p. 74. (2) 25 Ch. D. 39.
(3) 25 Ch. D. 41, n.

National School. A subsidiary and consequential part of the relief sought is, to restrain the Defendants from electing or appointing any other person to the office, and from ejecting the Plaintiff from the school-house or premises occupied by him in virtue of his office.

The law on the subject is this. In order to provide a simple and summary mode of removing a schoolmaster from the school-house and premises, the 13th section of the *Charitable Trusts Act*, 1860, enacts that when any schoolmaster, being in possession, by virtue of his office, of any house, buildings, land, or property of the charity, shall have been removed from or shall cease to hold his office, but shall refuse to relinquish possession to his successor or to the trustees or administrators of the charity, it shall be lawful for any two or more justices of the peace, and they are required, on the complaint of the trustees or administrators, and on the production of an order of the board certifying the schoolmaster to have been duly removed (which order under the seal of the Commissioners shall be conclusive evidence of the facts thereby certified, and of the jurisdiction of the Commissioners to make such an order), to issue a warrant to the peace officers to enter and deliver up possession, and to remove the schoolmaster. The "board" there referred to is, under sect. 2, the board of the Charity Commissioners for *England*, who are to have power to make such effectual orders as may now be made by any judge of the Court of Chancery for the removal of a schoolmaster.

Under a former Act—4 & 5 Vict. c. 38—there was a similar provision, by sect. 18, enabling the trustees or managers of a school to take summary proceedings before justices of the peace for the removal of a schoolmaster who had been dismissed, or had ceased to be the schoolmaster, from the house or property of the charity of which he might be in possession.

Now, first of all, is this action within the 17th section of the Act of 1853 or not? It is an action in Chancery; a suit for an injunction; a suit to prevent the trustees from removing the Plaintiff; and by 4 & 5 Vict. c. 38, s. 17, it is enacted "that no schoolmaster or schoolmistress to be appointed to any school erected upon land conveyed under the powers of this Act"

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(which, I understand, this school was), "shall be deemed to have acquired an interest for life by virtue of such appointment, but shall, in default of any specific engagement, hold his office at the discretion of the trustees of the said school."

The trustees, therefore, of this school have a discretion to dismiss the schoolmaster from his office. It is said they have exercised it. It is said, on the other hand, that they have not exercised it properly; and an action is brought in this Court for an injunction on the ground that they have not exercised it properly. Is this or is it not a suit relating to the property and affairs of the charity? Does it or does it not come within the words of the 17th section of the Act of 1853, "Before any suit for obtaining any relief, order, or direction concerning or relating to any charity, or the estate, funds, property, or income thereof, shall be commenced"? I cannot entertain the smallest doubt whatever that in the exercise of the powers conferred upon them the trustees of this school have purported to dismiss this schoolmaster. He does not like that, and he says, "I will not be dismissed; you are not acting rightly"; and he therefore brings a suit in Chancery, the main purpose and object of which is to induce the Court to say that the trustees had no right to dismiss him, and in fact had not dismissed him at all. It is a suit for relief concerning a charity in a matter which is essentially one of administration of the trusts of that charity; and commencing a suit of that kind without leave seems to me to be within the very mischief which the 17th section was intended to provide against. To my mind it is clear beyond all question that a suit of this kind ought not to be commenced until the leave of the Charity Commissioners has been first obtained.

Then it is said that, whether that is so or not, the action as regards the latter part of the relief claimed is a common law action. I am quite certain that is not so as to preventing the election of another schoolmaster, and that has not been argued; but it is said that, so far as it seeks to prevent the trustees from forcibly ejecting him from the school-house, it is a common law action. My answer to that is a distinct negative; in my opinion it is not a common law action.

Suppose this statement of claim had stated (which it has not

stated) that having dismissed the schoolmaster from his position, whether properly or improperly, the trustees were proceeding to eject him from the school-house forcibly without obtaining the order of two justices, and that the Plaintiff had sought an injunction in Chancery to restrain that; why should not that come within the section? If the trustees were wrong, the Charity Commissioners would give leave to bring the action. Why should not the Charity Commissioners be applied to in that case? In my opinion that also would be within the section. Supposing a schoolmaster instituted a suit in Chancery, saying, "I have been improperly dismissed, and I will not leave the house; or, if I have been properly dismissed, I ought not to be turned out of the house without an order of two justices;" it would, in my opinion, be right and proper, before he commenced a suit in Chancery of that kind, before he exposed the charity to the possible cost and trouble, worry and vexation of such a suit in Chancery, that he should have obtained the leave of the Charity Commissioners. This section was passed on purpose, it seems to me, to apply to such a case directly.

But, it is said, it does not apply to such a case, because in *Holme* v. *Guy* (1) it was determined that, in the converse case, where somebody has taken possession of property, or is in possession of property of the charity which he ought not to be in possession of, the charity trustees may bring ejectment against him without obtaining the leave of the Charity Commissioners. But the converse case is a very different case indeed. The man in possession of the charity property may have obtained possession as a simple intruder and trespasser; that is, he may be a person who has no right whatever to be there; and it is not an administration of the trusts of the charity in any sense to bring an action of ejectment to turn him out; but where a man has been allowed to go into possession under an appointment as schoolmaster in accordance with the trusts of the charity, and the charity trustees have dismissed him and are proceeding to eject him, and he wants an injunction in Chancery to prevent that, then I say, whether they are proceeding rightly or wrongly, the 17th section does apply, and he ought not to institute

(1) 5 Ch. D. 901.

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proceedings for an injunction of that kind until he has obtained the leave of the Charity Commissioners.

I am, therefore, of opinion that in this case there is no authority whatever to be found in the cases cited to interfere in the least degree with what I am now saying. In my opinion it is clearly a case which is within the mischief intended to be provided against by the 17th section, and this suit in Chancery ought not to have been begun without the leave of the Charity Commissioners.

Then I am asked, in the next place, if I come to that conclusion, to allow the matter to stand over in order that the Plaintiff may get leave; but the section begins by saying that the leave is to be obtained before the suit is commenced. I cannot help seeing that, if I were to hold that the section was to be construed as sanctioning such a course of proceeding as allowing the case to stand over and then be amended afterwards by stating that the leave of the Commissioners had been obtained, what would happen would be that in every case hereafter a person bringing such an action as this would not trouble himself to get the leave of the Charity Commissioners; he would say, "It does not matter; I will begin my action and go on, and if the objection should be raised, and the Court at the trial should think that the leave of the Charity Commissioners is wanted, I will get it then." That is exactly the kind of thing that this section of the Act was intended to prevent. It is before commencing the action that the leave is to be obtained.

Another objection is this: if I allow the action to stand over in order that leave may be obtained, the writ, which was issued more than a year ago, must be treated as a writ issued *nunc pro tunc*, and amendment must be allowed to the effect that the action was commenced after that leave obtained. I think that would be wrong. It would, I think, be entirely against the object and purpose of this section to allow the action to stand over for leave to be obtained. I am told that I did this once before in *Glen* v. *Gregg* (1). It is quite true that I did. I did so, following the precedent set by Lord *Chelmsford* in *Attorney-General* v. *Sidney Sussex College* (2), a case which was most

(1) 21 Ch. D. 513.

(2) 21 Ch. D. 514, n.

distinctly overruled by the Court of Appeal in *Glen* v. *Gregg* (1), however carefully the language of the Court of Appeal may seem to have avoided doing so. It was not overruled on the point of allowing the action to stand over, but it was overruled on the main point; and, Lord *Chelmsford* having merely intimated that he should allow the action to stand over for the leave of the Commissioners to be obtained, I think that intimation is not binding on me. I feel myself at liberty to follow that which is my own view of this section, not being in the least fettered by that or any other authority to the contrary. Accordingly, all I can say at present is that this suit has been improperly instituted, the leave which was necessary to be obtained not having been obtained. In my opinion that leave was necessary for every part of the relief claimed by this action; it was especially necessary for that which is the main relief sought, namely, an injunction to restrain the Defendants from dismissing the Plaintiff, his case being that he has been improperly dismissed.

Another argument addressed to the Court was this. It is said, suppose the suit were otherwise wrongly instituted, what will happen is this: under sect. 13 of the Act of 1860 proceedings may be taken before two justices of the peace for the removal of the schoolmaster, and if he still resists leaving the school it is open to him to bring an action at law, which he may be allowed to commence under 1 & 2 Vict. c. 74, upon providing certain sureties therefor; and this action must be treated as if it was an action of that kind. The answer to that is that in the first place there has been no order of the justices at all; no such action can at present be brought or can arise; when it does arise it will be time enough to deal with it. The case at present before the Court is that of a man who is seeking, without the leave of the Charity Commissioners, to obtain an injunction preventing his dismissal from the position of schoolmaster, and, as consequential to that relief, preventing his being ejected from the school-house; and he seeks all this without having done that which I hold to be essential, that is, without having first obtained the authority of the Charity Commissioners to commence such an

(1) 21 Ch. D. 513.

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action. I hold that the intention and the purpose of that provision of the *Charitable Trusts Act* was to prevent the possibility of a charity being harassed with suits of this kind.

This seems to me such a flagrant violation of the purpose and intention of the Act that I shall take the only course which I think is open to me, namely, to dismiss this action with costs.

G. I. F. C.

C. A.

From this judgment the Plaintiff appealed. The appeal came on to be heard on the 9th of June, 1890.

Cutler, Q.C., and *H. Lynn*, for the Plaintiff, referred to *Benthall* v. *Earl of Kilmorey* (1); *Brittain* v. *Overton* (2); *Holme* v. *Guy* (3); *Glen* v. *Gregg* (4).

Renshaw, Q.C., and *Decimus Sturges*, for the Defendant, cited *Braund* v. *Earl of Devon* (5); *Glen* v. *Gregg*; *Attorney-General* v. *Sidney Sussex College* (6); *In re Chelsea Waterworks Act* (7).

[FRY, L.J., referred to *In re London, Brighton and South Coast Railway Company* (8) and *In re Bingley Free School* (9).]

In the course of the argument the counsel for the Plaintiff, in answer to a question by the Court, undertook to give up all claim for relief, except on the ground that the managers had been improperly appointed.

COTTON, L.J.:—

This is an appeal by the Plaintiff, whose action was dismissed by Mr. Justice *Kay* on the ground that he had not obtained the previous consent of the Charity Commissioners under the 17th section of 16 & 17 Vict. c. 137.

At present I do not consider the question whether that consent was required; but I cannot agree with the view which has been expressed by Mr. Justice *Kay*, that the action ought to be dis-

(1) 25 Ch. D. 39.
(2) Ibid. 41, n.
(3) 5 Ch. D. 901, 905.
(4) 21 Ch. D. 513.
(5) Law Rep. 3 Ch. 800.
(6) 21 Ch. D. 514, n.
(7) 25 L. J. (Ch.) 49.
(8) 18 Beav. 608.
(9) 2 Drew. 283.

missed because that consent had not been obtained before the action was commenced. No doubt the terms of the 17th section do shew that the consent ought to be applied for before the action is begun. This is so no doubt. But then it does not say that if the consent is not obtained the action must be dismissed, and cannot be proceeded with until that consent is obtained. It would be wrong, I think, especially having regard to the decisions which were cited to us, to dismiss an action without giving the Plaintiff an opportunity of getting the consent and directions of the Charity Commissioners, simply on the ground that he had not applied for that before the action was commenced. No doubt it might save some difficulties and some costs if the rule were established, that there must be this consent before any action could be commenced. But in my opinion the course of the decisions, which we ought not to disturb lightly, has been this—that that consent may be obtained after the petition or after the action has been commenced, though of course if it cannot be obtained the result will follow which Mr. Justice *Kay* thought he could at once settle, namely, that the action will be dismissed. Therefore, so far as that goes, I cannot agree with the view expressed by Mr. Justice *Kay*.

But then we come to this question as to whether the consent of the Charity Commissioners is required. Of course if it is not, they need not go to the Charity Commissioners at all. Section 17, I think, only requires consent where the administration of a trust is in some way required; and if I could agree with my learned brothers in thinking there was no administration of a trust here required, I should say the consent was not to be applied for at all. As far as I understand them, they think it is a mere action by a person claiming by contract with the managers of this charity to enforce that contract and prevent anything being done in violation of that contract. If it was the case of a mere tradesman claiming as against the managers of the charity and seeking to enforce his rights under a contract made with them, I should say that the 17th section of the Act did not apply to such a case as that. But is that so? I think that is all he will ever get, if he ever gets anything; but I do not think we can say—at least I cannot say—that that is all he has claimed by his statement of

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claim, because he does not refer to his contract as giving this right, but, as I understand, refers to the deed of trust under which this school is held, and says, "Having regard to the trusts of that deed and the fact that I have been appointed schoolmaster of this school, I have a right under the trusts of this deed to have the possession of this school-house." That is really seeking to a considerable extent to obtain a decision of the Court on the proper administration of the trusts of this deed.

Now the Plaintiff has undertaken not to base his claim on anything except this—that those who dismissed him, namely, the vicar and the managers appointed by him, were not as regards the managers appointed by him duly constituted managers, and they ought to be looked upon as mere strangers. That undertaking, I understand, he is prepared to give, which will to some extent modify his claim. Still, to some extent he does claim, as I understand it, that by his appointment as schoolmaster under the trusts of the deed he has a right as a person claiming under the trusts of that deed to retain possession of that school-house. My opinion is, that having regard to what he has claimed, though he may not be really entitled to it, it will be open to him to enter into the discussion as to the proper administration of the trusts of this school. Therefore, in my opinion, though I believe both my learned brothers think differently, it is necessary that he should apply for and obtain, if the action is to go on, the consent of the Charity Commissioners.

BOWEN, L.J.:—

It is with much diffidence that I have come to a different opinion from that entertained by Lord Justice *Cotton*, whose experience on this class of subjects, as indeed on most others, is much greater than my own. But I am of opinion that, on the true construction of the *Charitable Trusts Act*, 1853, s. 17, the consent of the Commissioners is not necessary, either for the originating or for the prosecuting of this action. Speaking broadly, I think that this section does not deal with or touch actions which are brought to enforce common law rights, whether such rights arise out of contract or out of tort—or out of common law duty, I ought rather to say. I think also that it does not

apply to suits by individuals whose object is solely to obtain equitable relief in respect of common law rights; and I think, lastly, that this action at this stage, so far as we can judge of it at this stage, falls within the class of cases to which I have already said this section does not apply.

Now, in order to construe the section, we must examine carefully the words of it; and it is apparent from the initial language that actions at common law are not within the scope of the section, which applies simply to suits, petitions, or other proceedings for obtaining relief, order, or direction concerning or relating to any charity. Those were not, at the date of this statute, 1853, apt words for dealing with or describing common law actions, and it follows, in my opinion, that no common law action, or, in other words, no action brought solely to enforce a common law right, whether such right arises out of contract or out of common law obligation, or common law duty, is within the section. That view is in accordance with what I understand—though I am not sure that the language goes quite as far—would have been the view of the late Master of the Rolls, according to his judgment in *Holme* v. *Guy* (1). But as soon as you have advanced thus far in the construction of the section, it seems to me that reason and logic oblige you to go a step further. It is obvious that in the examination of the question of common law rights, matters may be inquired into which really do concern the charity, or opinions may be expressed by the Court which govern, so far as the decision between the parties can govern—or may govern—the actions of those who are bound to administer the charity; because the decision may involve the construction of a section of the Act of Parliament, or may involve a declaration as to the common law rights of the parties. Nevertheless, that does not operate to bring common law actions within the scope of the section from the language of which they are omitted; and the mere fact, therefore, that incidentally in the action may be decided a question which concerns a charity, is not enough apparently to bring the action within the provision of this Act of Parliament.

But if that is so, must we not go a step further, and ask

(1) 5 Ch. D. 901.

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ourselves whether it is possible that the Legislature can have enacted such an anomaly as not to require the consent of the Commissioners for actions for enforcing common law rights, but to make the obtaining their consent a necessity in such equitable suits as are merely instituted for the purpose of obtaining relief with regard to common law rights? Is it possible that such a construction of the statute can be reasonable? That would lead to the singular conclusion that, although a man was not obliged to obtain the consent of the Commissioners before prosecuting an action for breach of contract, he was obliged to obtain the consent of the Commissioners before he came to the Court of Chancery, or to the Chancery Division of the High Court, to appeal to the equitable jurisdiction of the High Court to prevent such a breach. It would lead to this curious conclusion —that although a man was not obliged to obtain the consent of the Commissioners before instituting an action for trespass, in which action the sole question would be his title to possession under the deeds of trust, he would nevertheless be obliged to obtain the consent of the Commissioners before he obtained an injunction to prevent the trespass being committed. That would be a curious anomaly, and one which, unless the language of the Legislature constrained one, one would scarcely adopt.

But on turning to the language of the section and reading it carefully, it seems to me that the scope of the section is indicated with sufficient precision to enable one to see that the Act of Parliament does not authorise such anomalies, and that, on the contrary, the consent of the Commissioners is only to be obtained in cases where administration of a trust is sought. This is a Chancery section. This is a Chancery statute. It was intended to cure the mischief of strangers instituting suits when the Charity Commissioners were the proper persons really to form an opinion on the subject; and the language is carefully confined to suits, petitions, or other proceedings for obtaining relief, order, or direction concerning or relating to any charity, or the estate, funds, property, or income thereof. This language of the section seems to me to shew that it is only in cases where administration is sought that the consent of the Commissioners becomes necessary, because the remedial provision introduced is that notice is to be

given to them of the suit and such particulars as may be required from time to time for explaining the nature and the objects of the suit, and the board if they think fit thereupon may do—what? Authorise or direct any suit, petition, or other proceeding to be commenced, presented, or taken with respect to such charity, and they may by such order or certificate require and direct any such proceeding so authorised by them in respect of such charity to be delayed during such period as seems proper, while the section further provides that every such order and certificate is to be in such form, and may contain such statement of particulars, as the board should think fit.

Now, is it possible that a section framed in those words is a section by which the Legislature intended to deal with individual common law rights, or any relief which was sought simply in respect of them? In the first place, be it observed that such a construction would be to place the Charity Board in the remarkable position of a Court without appeal upon the subject of common law rights—so that a man who had a claim against a charity which he could only enforce, or the apt relief in respect of which was an injunction from the Court of Chancery in regard to a threatened wrong, would find himself absolutely at the mercy of an irresponsible board. Such legislation is possible; but I think we ought not to assume without the clearest language that Parliament intended to destroy common law rights of Her Majesty's subjects by placing them at the mercy of an irresponsible tribunal or irresponsible department of the State. I think, therefore, that the true construction is, that this does not apply to suits whose object is merely to obtain equitable relief in respect of common law rights any more than it applies to common law rights.

Then comes the question, what is this suit? And I begin by observing that, in considering the problem whether the consent of the Commissioners is necessary or not, we can only judge of the suit as it appears at the stage at which we embark on the inquiry. I do not say it is probable—I do not think it is—but it is possible that a suit which at one stage appears to ask for relief, that falls solely within the category of that relief which I have said is not intended to be affected by the statute, may,

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nevertheless, at the hearing turn out to be a suit which involves something further, that might bring it within the scope of the section. I do not think it is likely; but still it is possible. We have only got to examine the suit as it is presented to us at the present moment. What is it? The Plaintiff is a certificated teacher who was appointed head master of the National School of *Allerton*, by the incumbent and managers. The language of the deed which applies to him is this: "It is hereby declared that the selection, appointment, and dismissal of the school teachers shall be in all respects under the control and management of the incumbent and his curate, and of four other persons to be nominated annually by the incumbent." And the 17th section of the 4th and 5th Vict. c. 38, if it applies to it, as it appears to do, provides "that no schoolmaster or schoolmistress to be appointed to any school erected upon land conveyed under the powers of this Act shall be deemed to have acquired an interest for life by virtue of such appointment, but shall, in default of any specific engagement, hold his office at the discretion of the trustees." Now the claimant has been appointed by the incumbent and the other managers, and he claims still to hold his office on the ground that those who dismissed him are not regularly appointed managers—are so-called managers who profess to act under a valid appointment when valid appointment there is none. But it strikes me that the Plaintiff's case really is one of contract only or of common law right. He may be entitled so long as he is an authorized school teacher to hold the school-house; but it is in virtue of the appointment which he holds from the managers, which is really a contractual employment by him to teach. He is simply enforcing here, or seeking to enforce, what he considers to be his common law right, not to be dismissed by those who have not employed him, and to hold premises which he has received from persons who are authorized to deal with the possession against the unlawful and unauthorized usurpation of those who are strangers altogether in the matter.

That is his case. It may be that incidentally the question whether these are managers of the school may be decided. We cannot help that, nor can the Plaintiff help it. He is dealing with his masters, or with those who profess to be his masters.

He declares that those who are seeking to exclude him from these premises are not the persons who are lawfully entitled to possession. The common law question may involve the construction of a deed, or may incidentally involve the question whether the managers who are seeking to oust him are really properly appointed. But, as I said before, the mere fact that such questions incidentally arise does not seem to me to bring the case within the section.

For those reasons, I think that the learned Judge below was wrong in holding that this action, in its present form, and as presented at this moment, was an action which fell within the 17th section of the *Charitable Trusts Act* of 1853, or which required the consent of the Charity Commissioners. Should a case ever arise in which an action at any stage does not seem to require the consent of the Charity Commissioners, but in respect of which subsequent investigation shews it is an action of a different kind from that shape which it took when it was first launched, then would come the moment for applying the section.

With regard to the second point, although it would not be absolutely necessary to give our decision on it if the first point I have dealt with is decided as I think it ought to be decided, nevertheless, having regard to the view of Lord Justice *Cotton*, I think it would not become me to abstain from expressing an opinion upon it. It is this—whether, supposing the consent of the Commissioners was necessary, it would be right to dismiss the action altogether. Upon that second point, I entirely agree with the Lord Justice. It does not seem to me that the proper course, if an action appears to the learned Judge at the hearing to be an action which falls within sect. 17, would be to dismiss it altogether; on the contrary, I think you ought to allow it to stand over to see if the consent of the Commissioners can be obtained.

Now, first of all, I come to that conclusion upon the language of the section. We are all of us familiar with the way in which Acts of Parliament are drafted to prevent actions being brought at all or writs being issued unless some condition precedent has been fulfilled. The language of such sections we are all familiar with, and the draftsman or the Legislature requires no

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obscure language if they desire to enact such laws. But this section is not framed in the way in which sections are framed when it is intended that some preliminary steps should be taken before the action is maintainable at all. On the contrary, both from the way in which it is framed, from the omission of the usual words, and also from the presence of words which seem to me to indicate that the absence of the consent of the Commissioners is only a bar to the Courts dealing with the action, and not a bar to the original institution of the suit—on all those three grounds I come to the conclusion that this section enables the Court, in such cases as I have indicated, to allow the action, to stand over in order that the blot which has occurred may be cured if possible. In the first place, the section only begins with the enactment, "Before any suit shall be commenced there shall be transmitted notice in writing to the board"; but it abstains altogether from saying that the action is to be dismissed if no such notice is transmitted. On the contrary, it only indicates that, "save as hereinbefore provided, no suit, petition, or other proceeding shall be entertained or proceeded with by the Court;" that is to say, the enactment is directory. It directs what ought to be done. Unless the duty is complied with by the litigant the Court must hold its hand. But it does not oblige the Court to close the gates of mercy upon the applicant, but enables it to stay proceedings until that consent, which as a matter of duty ought to be obtained in the first instance, is obtained at last. That, to my mind, is the scope of the section, and I cannot help here saying that if my view of the earlier point is correct, it adds additional weight to this conclusion on the second point; because, if the only cases with which the section is intended to deal are cases which affect the administration of trusts and are really suits for administration of it, all the mischief, or substantially the entire mischief which used to arise, may be prevented if the Court is clothed with the power of staying the action until the proceeding has been had which ought to be had in the first instance.

If the matter rested upon logic and reason only, that would be my conclusion; but in looking back through the books we find a considerable number of authorities which shew that the Court

has taken the view of the section on this second point which the Lord Justice *Cotton* and myself both take, and has been satisfied with letting actions stand over to obtain the consent of the Charity Commissioners when such consent has not been acquired in the first instance. I will simply name the cases in which such procedure has been had: *In re Markwell's Legacy* (1); *In re London, Brighton, and South Coast Railway Company* (2); *In re Bingley Free School* (3); *In re Chelsea Waterworks Act* (4); and *Attorney-General* v. *Dean and Canons of Manchester* (5), a case which went to the Court of Appeal, though I do not know that the point was brought before the attention of that Court afterwards. One case and one case only was said to be inconsistent with this view, namely, the case of *Glen* v. *Gregg* (6), in which it was said that the dilatory action taken by Lord *Chelmsford* as Lord Chancellor had been afterwards disapproved by the Court of Appeal here. On examination of Lord *Chelmsford's* decision in *Attorney-General* v. *Sidney Sussex College, Cambridge* (7), it does not appear to me that it is that portion of Lord *Chelmsford's* decision which is disapproved of by the Court in *Glen* v. *Gregg*, but the action taken by the Lord Chancellor in a case in which *ex concesso* the consent of the Charity Commissioners was required in deciding to allow such consent to be waived, and to proceed with the action, although such consent had not been acquired. In doing that Lord *Chelmsford* was enabling the parties to consent to waive a bar which was instituted for the benefit of the public and for the protection of charities. I think the Court of Appeal might well consider that such action by the Lord Chancellor was not to be justified upon the ordinary principles of law; and I think it is to such a point that the criticism in *Glen* v. *Gregg* was directed. It does not appear to me that *Glen* v. *Gregg* in any way decides, or was intended to decide, that in a case in which the consent of the Commissioners was required, but had not been obtained, the Court might not cure the blot by allowing the action to stand over.

(1) 17 Beav. 618.
(2) 18 Beav. 608.
(3) 2 Drew. 283.
(4) 25 L. J. (Ch.) 49.
(5) 18 Ch. D. 596.
(6) 21 Ch. D. 513.
(7) 21 Ch. D. 515, n.

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On these grounds, I think that the learned Judge below was incorrect in the view he took of this litigation, which I regret to think is going to be waged further, because nothing but disaster can come of it. Nevertheless, if the Plaintiff desires it, I think he is entitled at our hands to a declaration that the learned Judge below proceeded on an erroneous construction of the Act of Parliament. The case must go back to be tried out; and if it is to be tried out to the detriment and ruin of the Plaintiff, he brings it upon his own head. The costs of the hearing below and of this appeal ought, I think, to be borne by the Respondents.

FRY, L.J.:—

I have had the benefit of discussing this question with my learned brothers, and the judgment of the Lord Justice *Bowen* throughout so completely expresses the views which I entertain that I shall only add one word of explanation. It is this—that in dwelling emphatically as he has done upon the 17th section of the *Charitable Trusts Act*, 1853, not referring to common law rights and to legal or equitable modes of enforcing those common law rights, he does not, as I understand, intend to imply that an individual equitable right, not relating to the administration of the trusts of the charity, would be any more within the 17th section than a legal right. In my opinion, it is not any more within it. In my opinion, the section relates exclusively to administration.

BOWEN, L.J.:—

I agree with that. With regard to the costs, Lord Justice *Fry* has pointed out to me that my language may be misinterpreted. I do not think that the costs of the hearing necessarily ought all to be borne by the Respondents, only such costs as were either caused or thrown away by reason of this point being taken.

Solicitors: *Baker & Nairne; Vincent & Vincent*, agents for *North & Sons, Leeds.*

M. W.

In re THOMPSON. BEDFORD *v.* TEAL.

C. A. 1889

STIRLING, J. *Jan.* 16; *Nov.* 6, 23.

C. A. 1890 *June* 25, 27.

[1888 T. 228.]

Legacy to Charity—Pure Personalty—Charge on Borough Fund of Municipal Corporation—Charge on District Rate under the Public Health Act, 1875—9 *Geo.* 2, *c.* 36, *s.* 3 [*Revised Ed. Statutes, vol. ii., p.* 403].

A mortgage made pursuant to statutory powers to charge the borough fund of a municipal corporation, is only a charge on the surplus money remaining in the hands of the corporation after satisfying the purposes mentioned in sect. 92 of the *Municipal Corporations Act*, 1835 (5 & 6 Will. 4, c. 76), or sect. 140 of the *Municipal Corporations Act*, 1882 (45 & 46 Vict. c. 50), and although the borough fund arises in part from rents of land, the charge does not give an interest in land within the meaning of 9 Geo. 2, c. 36, s. 3.

A mortgage was given including the district fund of a borough. The district fund was formed under the *Public Health Act*, 1875, the 175th section of which enacts that all surplus lands shall be sold and the proceeds carried to the district fund:—

Held, that the section could not apply unless there were surplus lands, and that as it was not shewn that there were any, the mortgage must be treated as pure personalty.

Whether, if there had been surplus lands, the mortgage must not still have been treated as pure personalty, on the ground that as the lands were directed by statute to be sold the doctrine of election was excluded, so that the mortgagee took no interest in anything but money, *quære*.

Whether a charge which gives the holder no right against anything except money which has gone as money into a particular fund, can ever be treated as giving an interest in real estate because the money has come from real estate, *quære*.

Decision of *Stirling*, J., reversed.

J. R. THOMPSON, by will dated the 3rd of June, 1887, bequeathed charitable legacies to the amount of £2450, directing them to be paid exclusively out of such part of his personal estate as might be legally bequeathed for charitable purposes. His personal estate was valued at £5283 11*s.* 9*d.*, of which £4968 consisted of nine municipal corporation mortgages for sums amounting to £5000. Among these were a mortgage dated 7th of October, 1878, by the corporation of *Dewsbury* for £500, a mortgage dated 1st of April, 1887, by the corporation of *Bradford* for £400, and two dated respectively 10th of May,

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1881, and 9th of December, 1884, by the corporation of *Wakefield* for £500 each.

The *Dewsbury* mortgage was given under the powers of the *Dewsbury and Heckmondwike Waterworks Act*, 1876 (39 & 40 Vict. c. clxxxv.), s. 111, which enacted that: "For the purposes of this Act the *Dewsbury* corporation, in addition to any moneys they have borrowed, or are authorized to borrow, may from time to time, under the authority of this Act, borrow at interest, on the security of their share, and of the rates, rents, and revenues derived from the undertaking of the waterworks board, and to be levied, taken, or received by the said corporation, and if they think fit, as a collateral security, of the borough fund of the borough of *Dewsbury* borough rate, general district rate, and public water rate leviable within the said borough, or any one or more of such fund or rates, such sums as they from time to time think requisite, not exceeding in the whole the sum of £135,000, and they may grant mortgages of their said share and of the said borough fund and rates or some of them accordingly, and the mortgages granted by the *Dewsbury* Corporation under this Act, and the transfers thereof, may be according to the forms in the schedule to this Act or to the like effect."

By sect. 124: "The mortgagees of the *Dewsbury* corporation and of the *Heckmondwike* board respectively may enforce payment of arrears of interest or principal or principal and interest due on their mortgages, granted under the recited Acts or any of them, or this Act, or holders of funded debt may enforce arrears of annuities due to them, by the appointment of a receiver." There followed a provision that the amount of money owing to the mortgagees applying for a receiver must not be less than one-tenth of the whole debt. There was no express direction as to what the receiver was to collect.

By the mortgage of 7th of October, 1878, the corporation of *Dewsbury*, in consideration of £500 paid to them by *J. R. Thompson*, granted to him, his executors, administrators, and assigns, "the share and interest of the mayor, aldermen, and burgesses in the rates, rents, and money to be received in respect or by means of the waterworks of the *Dewsbury and Heckmondwike Waterworks Board*, and also as a collateral security the borough

rates and borough fund, or general district rates and public water rate of the said borough, to hold until the said sum of £500 with interest at the rate of £4 per centum per annum for the same shall be fully paid and satisfied.

(2.) The *Bradford* mortgage of the 1st of April, 1887, was made by virtue of the *Bradford Improvement Act*, 1850 (13 & 14 Vict. c. lxxix.), and of two orders of the Board of Trade, confirmed by the *Tramways Companies* (*No.* 2) *Act*, 1880, and the *Tramways Orders* (*No.* 1) *Companies Act*, 1883. By it the corporation of *Bradford*, in consideration of £400 paid to them by *Thompson*, granted and assigned to him, his executors, administrators, and assigns, "such proportion of the borough fund of the said borough, and the rates, rents, profits, and other moneys forming such borough fund, or arising or accruing from the said borough fund of the said borough, as the said sum of £400 doth or shall bear to the whole sum which is, or shall be, borrowed on the credit of the said borough fund, rates, rents, profits, and moneys, to hold the same unto the mortgagee, his executors, administrators, and assigns, from the 25th of March, 1887, until the said sum of £400, with interest at the rate of £3 5*s.* per annum, for the same to be computed from the date aforesaid, shall be fully paid and satisfied."

The town clerk deposed that the borough fund (1) consisted of

(1) Sect. 92 of the *Municipal Corporations Act*, 1835 (5 & 6 Will. 4, c. 76), enacts as follows as to the borough fund: "After the election of the treasurer in any borough, the rents and profits of all hereditaments, and the interest, dividends, and annual proceeds of all moneys, dues, chattels, and valuable securities belonging or payable to any body corporate named in conjunction with the said borough in the said Schedules A and B, or to any member or officer thereof in his corporate capacity, and every fine or penalty for any offence against this Act (the application of which has not been already provided for), shall be paid to the treasurer of such borough; and all the moneys which he shall so receive shall be carried by him to the account of a fund to be called 'the Borough Fund'; and such fund, subject to the payment of any lawful debt due from such body corporate to any person, which shall have been contracted before the passing of this Act, and unredeemed, or of so much thereof as the council of such borough from time to time shall be required or shall deem it expedient to redeem, and to the payment from time to time of the interest of so much thereof as shall remain unredeemed, and saving all rights, interests, claims, or demands of all persons or bodies corporate in or upon the real or

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the proceeds of the borough rate, the profits arising from the various undertakings of the corporation, the allowances made by the Treasury for police and prosecutions, and the rents of certain surplus lands acquired by the corporation for an enlargement of the town hall and for street improvements.

(3.) The *Wakefield* mortgages were made under the *Wakefield Corporation Waterworks Act*, 1880. By each of them the corporation, in consideration of £500 paid to them by *Thompson*, assigned to him "the share and interest of the said mayor, aldermen, and burgesses in the revenue to be received in respect or by means of the waterworks authorized by the said Act, and also as a collateral security, the general district rates and district fund (1) of the said borough, to hold until the said sum of £500,

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personal estate of any body corporate by virtue of any proceedings either at law or in equity which have been already instituted, or which may be hereafter instituted or by virtue of any mortgage or otherwise, shall be applied towards the payment of the salary of the mayor, and of the recorder and of the police magistrate hereinafter mentioned when there is a recorder or police magistrate, and of the respective salaries of the town clerk and treasurer, and of every other officer whom the council shall appoint, and also toward the payment of the expenses incurred from time to time in preparing and printing burgess lists, ward lists, and notices, and in other matters attending such elections as are herein mentioned, and, in boroughs which shall have a separate court of sessions of the peace, as is hereinafter provided, towards the expenses of the prosecution, maintenance, and punishment of offenders, and towards such other sum to be paid by such borough to the treasurer of such county as is hereinafter provided, and towards the expense of maintaining the borough gaol, house of correction, and corporate buildings, and towards the payment of the constables, and of all other expenses not herein otherwise provided for which shall be necessarily incurred in carrying into effect the provisions of this Act; and in case the borough fund shall be more than sufficient for the purposes aforesaid, the surplus thereof shall be applied, under the direction of the council, for the public benefit of the inhabitants and improvement of the borough; . . ."

The *Municipal Corporations Act*, 1835, was repealed by the *Municipal Corporations Act*, 1882 (45 & 46 Vict. c. 50), which substituted for the above section sects. 139, 140, 143, which the Court considered to be to the same effect as regarded the present question.

(1) Sect. 175 of the *Public Health Act*, 1875 (38 & 39 Vict. c. 55), enacts that, "Any local authority may for the purposes and subject to the provisions of this Act purchase or take on lease sell or exchange any lands, whether situated within or without their district. . . . . Any lands acquired by a local authority in pursuance of any powers in this Act contained and not required for the purpose for which they were acquired shall (unless the Local Government Board otherwise

with interest at the rate of £3 15*s.* per cent. per annum for the same, shall be fully paid and satisfied."

The *Wakefield Corporation Waterworks Act*, 1880 (43 & 44 Vict. c. lvii.), by sect. 57 authorized the corporation to borrow money for the purposes of the Act to an amount not exceeding £300,000. Sect. 58: "For securing the repayment of moneys borrowed under the authority of this Act, the corporation may mortgage the water revenues and the district fund and general district rate, or either of them, and the provisions contained in sects. 236 to 239, both inclusive, of the *Public Health Act*, 1875, with respect to the mortgages to be executed by a local authority, shall apply in the case of all mortgages granted under the powers of this Act, except where any such provisions are hereinafter expressly altered or varied; and for the purposes of such application, the term local authority in the said provisions shall be construed to mean the corporation: . . . . The mortgagees of the corporation under this Act may enforce payment of arrears of

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direct) be sold at the best price that can be gotten for the same, and the proceeds of such sale shall be applied towards discharge, by means of a sinking fund or otherwise, of any principal moneys which have been borrowed by such authority on the security of the fund or rate applicable by them for the general purposes of this Act, or if no such principal moneys are outstanding shall be carried to the account of such fund or rate."

Sect. 177 authorized any local authority, with the consent of the Local Government Board, to let for any term any lands they might possess as and when they could conveniently spare the same.

Sect. 207 provides that all expenses incurred by an urban authority in the execution of the Act, and not otherwise provided for, shall be charged on and defrayed out of the district fund and general district rate, with certain exceptions.

Sect. 209: "In the district of every urban authority whose expenses under this Act are directed to be defrayed out of the district fund and general district rate there shall be continued or established a fund called the district fund: a separate account, called 'the district fund account' of all moneys carried under this Act to the account of that fund shall be kept by the treasurer of the urban authority; and such moneys shall be applied by the urban authority in defraying such of the expenses chargeable thereon under this Act as they may think proper."

Sect. 210: "For the purpose of defraying any expenses chargeable on the district fund which that fund is insufficient to meet, the urban authority shall from time to time, as occasion may require, make by writing under their common seal, and levy in addition to any other rate leviable by them under this Act, a rate or rates to be called 'general district rates.'"

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interest or principal or principal and interest by the appointment of a receiver."

The town clerk of *Wakefield* deposed that the water rate and general district rate were recoverable, in case of default, by order of a Court of summary jurisdiction, and, in default of compliance with such order, by distress on the goods and chattels of the defaulter. That the district fund consisted of the income and profits accruing from the various undertakings of the corporation, the proceeds of the general district rate, contributions from the county authority and from Government in respect of the maintenance of main roads, and "the rent of a cottage, the site of which, with other surplus land, was acquired by the corporation under the *Public Health Act*, 1875, for the purposes of their sanitary department or undertaking." He further stated that the corporation had no leasehold or real estate, "except that acquired by the corporation for their various undertakings, and from which they do not receive any rent except the rent of the cottage before mentioned."

The trustees and executors of *Thompson's* will took out an originating summons under Order LV., r. 3, to have it decided whether the charitable legacies were to any and what extent void by reason of so large a part of the assets of the testator consisting of corporation bonds.

The summons was adjourned into Court, and came on before Mr. Justice *Stirling* on the 16th of January, 1889.

F. H. Colt, for the Plaintiffs.

Charles Browne, for the residuary legatees.

Hastings, Q.C., and *Bardswell*, for the charities.

STIRLING, J., decided that one mortgage for £500 was pure personalty, and that four others, for sums amounting to £2600, created an interest in land, and could not be given to a charity. He reserved judgment as to the above-mentioned *Wakefield* mortgages, and directed the case to stand over for further evidence as to the *Bradford* mortgage for £400 and the *Dewsbury* mortgage.

1889. Nov. 6. The case came on again to be heard in respect of the *Bradford* bond for £400 and the *Dewsbury* bond.

Charles Browne submitted that, upon the facts proved by the evidence, the bonds were impure personalty.

Hastings, Q.C., and *Bardswell*, contended that a charge upon the borough fund was analogous to a charge upon a railway, which gave to the mortgagee an interest in the net result of the undertaking, but it did not confer upon him the right to go upon the land, or to take the rents from the tenants.

[STIRLING, J., referred to the case of *In re David* (1).]

Charles Browne, in reply.

1889. Nov. 23. STIRLING, J.:—

In this case I have to decide whether certain bonds of the corporations of *Dewsbury*, *Bradford*, and *Wakefield* are pure or impure personalty. The point which I have to consider came before Mr. Justice *North* in the case of *In re Hatton*. In that case, according to the shorthand note of the judgment with which I have been furnished, Mr. Justice *North* said: "Another question raised by the summons was whether certain debentures or mortgages of the *Batley* corporation, to the amount of £7500 in all, were pure or mixed personalty—that is to say, whether they gave the holder of the mortgages such an interest in land as to render them obnoxious to the *Statute of Mortmain* (9 Geo. 2, c. 36), and incapable of being bequeathed to charities. To take the words of one of the bonds (they were substantially in the same form), the corporation of *Batley* granted to the said *Eliza Hatton*, for the purpose of the Act under which the charge was given, the interest of the said mayor, aldermen, and burgesses in the gas rates, rents, and money to be received in respect of the gasworks of the said mayor, aldermen, and burgesses, and also, as collateral security, the borough rates and borough fund of the said borough." Then Mr. Justice *North* continued: "Now, the borough fund in this case consists of (among other things) rents of surplus land; and although, no doubt, they are fee farm rents out of land that has been sold subject to this arrangement, yet they are not the

(1) 41 Ch. D. 168; 43 Ch. D. 27.

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less rents. There are many decisions which have held that a gift of an interest in the rents of land is a gift of an interest in land, and is void under the statute. Under these circumstances, though, if I could have decided the other way, I am satisfied that the mischief aimed at by the statute would never have arisen, yet I feel bound by the many previous decisions of the Court, where it has been held that a charge upon rents, or a gift of rents, or a legacy payable out of rents, is an investment in land under the statute." In that decision, and in those latter words, more particularly I concur, because, like the learned Judge, I should prefer to decide the other way, being satisfied that the mischief aimed at by the statute would never arise. But I am bound by the numerous decisions to which Mr. Justice *North* referred. It is, therefore, in each case necessary to inquire whether a charge was constituted upon rents arising out of land. I take, first of all, the case of the *Dewsbury* mortgage. That is the same case exactly as occurred before Mr. Justice *North*, because in that case, as in this, there was a charge in the first instance upon the gas rates, and a collateral security, as here, upon the borough rates and borough fund. What, then, did the borough fund of *Dewsbury* include? It is clear from the affidavit of the town clerk of that borough, that the corporation had freehold property producing rent, which rent formed part of the borough fund, and which was consequently charged by the bond in question.

I next turn to the *Bradford* mortgage for £400. In that case the words are a little wider, but they make the matter, if possible, more plain, because there is an express charge upon rents. What do we find as regards that? The affidavit of the town clerk of that borough states the facts, and again we find rents of real estate forming part of the borough fund, and therefore this bond is open to the objection which has been pointed out by Mr. Justice *North*. There remains the case of the two bonds of the corporation of *Wakefield* for £500 each, which are not charged upon the borough fund, but on another fund, viz., the district fund under the *Public Health Act*, 1875. [His Lordship referred to the bonds, and to sects. 177, 207, 209, and 210 of that statute, and continued:—] I have searched through

that Act for the purpose of finding any direction as to what is to become of the rent of the land authorized to be let under sect. 177, and, curiously enough, there is no express direction as that given. There is a provision in sect. 175 as to the dealing with surplus lands, and as to the application of the proceeds of sale; but those are in the strict sense surplus lands—lands which are not required for the purposes of the undertaking. Sect. 177 is wider; so that, if land be required for the purposes of the board, and it can be conveniently let, there is power for the local authority to let it with the consent of the Local Government Board, and that even although they could not sell it. I am unable to see to what other fund these rents can belong than to the district fund, and consequently the reasoning of Mr. Justice *North* applies, although there is no express provision here, such as is to be found in the *Municipal Corporations Act*, directing the rents of the property to be paid into the fund in question. Then the question arises here—to which constituent of this district fund do the rents belong? That appears from sect. 58 of the *Wakefield Corporation Act*, 1880, and from the affidavit of the town clerk of that borough (1). The cottage from which the rent accrued was acquired for sanitary purposes under the *Public Health Act*; but, under the terms of that Act, all the expenses chargeable under that Act are payable, of whatever kind, out of the district fund, and the corporation have authority to charge that. It seems, in this case, that rent of land enters as an ingredient, and that, again, the reasoning of Mr. Justice *North* must apply. I come, therefore, with the same expressions of regret, to the conclusion that all these are impure personalty.

I ought to add that I have considered the argument of Mr. *Graham Hastings*—that in each case there were undertakings similar to that which was the subject of decisions in *Attree* v. *Hawe* (2) and *Gardner* v. *London, Chatham, and Dover Railway Company* (3); but, having regard to the terms of the *Public Health Act*, 1875, and of the *Municipal Corporations Act*, 1882, I cannot arrive at that conclusion; and I observe that, in the case of *In re David* (4), which has been decided by the Court of Appeal

(1) *Ante*, pp. 165, 166.
(2) 9 Ch. D. 337.
(3) Law Rep. 2 Ch. 201.
(4) 43 Ch. D. 27.

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since the hearing of this summons, their Lordships gave no encouragement to that view.

The costs of all parties must be paid out of the general residuary estate.

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An order was accordingly made declaring all the nine mortgages, except one for £500, to create interests in land within 9 Geo. 2, c. 36. The charitable legatees appealed from this decision, so far as related to the four mortgages which are particularly mentioned above. The appeal came on for hearing on the 25th of June, 1890.

Cozens-Hardy, Q.C., and *Swinfen Eady*, for the appeal:—

As to the *Dewsbury* bond, a mortgage of water rates is not an interest in land within 9 Geo. 2, c. 36.

[*Charles Browne*, for the residuary legatees:—I do not contend that it is. I rely on the collateral charge on the borough fund.]

The constitution of the borough fund is shewn by the *Municipal Corporations Act*, 1835, sect. 92. The fund, it is true, is partly composed of rents, but by no means known to the law could a mortgagee lay hold of the rents as rents; he can get at nothing but the cash which remains in the hands of the corporation after the purposes of sect. 92 have been satisfied, and that does not savour of realty. The saving clause in the section does not give to a mortgage made after the passing of the Act priority over the purposes mentioned in the section—it only saves existing rights.

[FRY, L.J., referred to *Arnold* v. *Mayor of Gravesend* (1).]

A man's balance at his banker's is indisputably pure personalty, though it may have arisen solely from rents of real estate. The case is on all fours in substance with *Attree* v. *Hawe* (2). The case of *In re David* (3) is a case of a different character, for the Court of Appeal there held the mortgage to be one which would enable the mortgagee to get a receiver of the

(1) 2 K. & J. 574. (2) 9 Ch. D. 337.
(3) 43 Ch. D. 27.

tolls. *In re Harris* (1) has a strong bearing on the present case; the bond was held to be pure personalty, because all that the justices could charge was what came to their hands as money. In that case the Master of the Rolls was evidently disposed to treat *Finch* v. *Squire* (2) as overruled by *Attree* v. *Hawe* (3), and Vice-Chancellor *Bacon* in *Jervis* v. *Lawrence* (4) took the same view. The same arguments apply to the *Bradford* bond.

[FRY, L.J.:—How would you recover under this bond?]

We apprehend that the Court by its inherent jurisdiction could appoint a receiver. The Lord Justice *James* in *Attree* v. *Hawe* clearly intimates that that is so. As to the *Wakefield* bonds, there are no rents falling into the borough fund, and a mortgage of the district rate would not enable a mortgagee to levy it.

[FRY, L.J.:—Does not the power to recover rates by distress make them an interest in real estate?]

Charles Browne, for the residuary legatees:—

If a sum of money is so secured that it may come in part out of land, a gift of it to a charity is wholly void: *Brook* v. *Badley* (5). Here the *Dewsbury* and *Bradford* bonds affect the borough fund which partially arises from rents of land, and they are therefore impure personalty.

[FRY, L.J.:—Suppose you place a tub under your apple-tree and give a charge upon such apples as fall into it, is that an interest in land?]

Yes, because the apples being now on the tree are part of the land. I submit that a statutory power to mortgage the borough fund gives a charge on the items which constitute it, and that such charge takes precedence over the purposes mentioned in the 92nd section of the *Municipal Corporations Act*, 1835. That section expressly makes those purposes subject to the rights of mortgagees, and any statutory mortgage will satisfy those words.

[BOWEN, L.J., referred to *Attorney-General* v. *Mayor of Newcastle-on-Tyne* (6) as to the effect of a saving clause.]

(1) 15 Ch. D. 561.
(2) 10 Ves. 41.
(3) 9 Ch. D. 337.
(4) 22 Ch. D. 202.
(5) Law Rep. 3 Ch. 672.
(6) 23 Q. B. D. 492, 498.

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As to the *Wakefield* mortgages, they are charges on the district fund, and by sect. 175 of the *Public Health Act*, 1875, the produce of sale of surplus lands is to fall into that fund. It therefore is an interest in real estate.

F. H. Colt, for the Plaintiffs.

Cozens-Hardy, in reply:—

The question put by the Court as to the remedy by distress is answered by *Edwards* v. *Hall* (1), which first decided that arrears of rent were pure personalty. As to the argument on sect. 175 of the *Public Health Act*, I say, (1) that this section is not incorporated in the *Wakefield Act*, and therefore does not apply; (2) that as the sale of surplus lands is ordered by statute, the doctrine of election does not apply, and the mortgagee cannot take anything but money; (3) that the section cannot affect the case unless there is surplus realty, and there is no sufficient evidence of there being any.

COTTON, L.J:—

This is an appeal from Mr. Justice *Stirling* with regard to certain bonds of three municipal corporations, which he has held to create an interest in land within the Act 9 Geo. 2, c. 36. I do not use the expression "impure personalty" or "personalty savouring of realty," for what the Act speaks of is an interest in land, or a charge or incumbrance affecting land.

The *Bradford* bond and the *Dewsbury* bonds really come within the same class, for although one is a charge on the borough fund of the corporation under the *Municipal Corporations Act*, 1835 (5 & 6 Will. 4, c. 76), and the other on the borough fund under the *Municipal Corporations Act*, 1882 (45 & 46 Vict. c. 50), that makes no practical difference, as the provisions in the two statutes as to the borough fund are substantially the same. Now, although the *Dewsbury* bond and the *Bradford* bond charge other things besides the borough fund, the Respondents rely solely upon the fact that they charge the borough fund. They urge that the borough fund consists in

(1) 6 D. M. & G. 74.

part of rents arising from real estate, and that a mortgage of it is therefore an interest in or a charge upon land within the meaning of 9 Geo. 2, c. 36. Now, the borough fund, no doubt, does to a certain extent arise from rents of land, but what is to be done with them when they become part of the borough fund? In my opinion, the Act 5 & 6 Will. 4, c. 76, sect. 92, imposes a statutory duty upon those who administer the corporation funds to apply the borough fund for the purposes there mentioned, and although there is in that section a saving clause in favour of persons claiming under any mortgage, it is in my opinion only a saving of the rights of those who at the time of the passing of the Act had charges, with the rights existing under which the Legislature did not think it just to interfere. A saving clause as a general rule is not intended to give power to a corporation or body to do something which they could not otherwise do, but to prevent the enactment from interfering with rights already acquired. On the true construction of these bonds, they do not, in my opinion, purport to charge the borough fund before the duties mentioned in sect. 92 are performed by the corporation. The object of the Acts under which the corporations of *Bradford* and *Dewsbury* gave the bonds which are before us was to enable them to do what they otherwise could not do, viz., to charge beforehand that portion of the borough fund which in each year would, after satisfying the liabilities imposed by sect. 92, remain in their hands to be applied for the benefit of the inhabitants and the improvement of the borough. If a power were not given to charge that surplus beforehand, it might be said, and, as I think, correctly, that the corporation could not, until it arose, determine how it was to be applied for the benefit of the borough. The bonds then being only charges on the surplus remaining in the hands of the corporation, after they have satisfied the purposes pointed out in sect. 92, the case comes within the principle of *Attree* v. *Hawe* (1), and in my opinion these bonds do not give the holder any interest in land within the meaning of 9 Geo. 2, c. 36. The case stands on precisely the same footing under the *Municipal Corporations Act*, 1882. This disposes of the *Bradford* and the *Dewsbury* bonds.

(1) 9 Ch. D. 337.

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Then as to the bonds of the *Wakefield* corporation. The only point laid hold of with regard to them is that they charge the district fund of the borough, and it is said that this makes them a charge upon land or an interest in land within the meaning of the Act of 9 Geo. 2, c. 36. What is relied upon principally, and it seemed to me at first sight to be a strong point in favour of the Respondents, is sect. 175 of the *Public Health Act*, 1875, which declares that the surplus lands—that is to say, lands that the corporation have acquired but do not require for the purposes of the Act—shall be sold, and the money arising from the sale shall be applied towards discharging and paying off the money that has been borrowed on the security of the fund or rate applicable for the general purposes of the Act, or, if no principal moneys are outstanding, shall be carried to the account of such fund or rate, *i.e.*, the district fund or the general district rates. There may be a grave question, which I do not think it necessary to answer on the present occasion, whether, where an Act of Parliament directs land to be sold, any charge on the money arising from the sale of that land can ever enable the holders of the charge to take the land. Where no charge is given except upon the proceeds of the sale of land which an Act of Parliament directs to be sold and converted into money, can that charge be a charge on or interest in land within the meaning of 9 Geo. 2, c. 36? That point may hereafter have to be decided; but it lies on the Respondents to shew that this is an interest in land, or a charge upon land. How can they shew that? They must shew that there is land which comes within the purview of sect. 175, and the proceeds of which are to be applied in payment of these bonds. It does not appear from the evidence that there is any surplus land unless the cottage is to be taken as such. The cottage now seems to be employed for the purposes of the corporation, and we cannot, in the absence of distinct evidence, hold that it is land which ought to have been sold and the proceeds brought into the district fund.

Another contention was raised by Mr. *Cozens-Hardy*, that sect. 175 is not incorporated with the special Act of the *Wakefield* corporation. But there is a question upon which, as it has not been fully argued, I give no opinion, whether this is not a general

section which, without being incorporated, would apply to all lands bought by the corporation and not required for its objects.

BOWEN, L.J. :—

I am of the same opinion. The question with regard to all these bonds is the question which the Lord Justice *Cotton* has enunciated, viz., whether they constitute an interest in or charge on land within the statute 9 Geo. 2, c. 36. We may divide them into two classes, the *Dewsbury* and *Bradford* bonds and the *Wakefield* bonds. The *Dewsbury* bond was given under the authority of sect. 111 of the *Dewsbury Waterworks Act* of 1876, which authorizes the *Dewsbury* corporation to create a collateral security on the borough fund. What does that enable them to do? The borough fund exists by virtue of sect. 92 of the *Municipal Corporations Act*, 1835, and the character of the fund is shewn by that section. It is a fund which may arise partly from rents, for, if the corporation has real property producing rents, the rents are to be carried to that fund. Out of that fund certain purposes specified by the section, which are vital to the existence of the corporation, have to be satisfied, and the surplus is to be applied for the public benefit of the inhabitants and improvement of the borough. Is it, then, intended by sect. 111 of the *Dewsbury Waterworks Act* of 1876 to enable the creditor who lends money upon the collateral security of the borough fund to get a charge upon the rents of the real property of the corporation before they pass into the fund, and before the statutory purposes which are created by sect. 92 of the *Municipal Corporations Act* have been satisfied? It is, to my mind, impossible to suppose that such was the intention of the Legislature. All, therefore, that is charged by the bonds, and the only thing in which an interest is created by them, is the surplus which from time to time may exist, or may not exist, and which exists only if the fund is more than sufficient for the statutory purposes which are made a primary charge upon it by the *Municipal Corporations Act*. The charge in the bonds is not a charge upon the corporate property, but simply a charge upon a floating balance, such as was alluded to by Lord Justice *Fry* at the end

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of his judgment in *In re David* (1). It is the primary duty of the corporation to apply this fund in satisfying the ordinary municipal wants, and it is impossible, therefore, that a receiver could be appointed of the rents which flow into it. That disposes of the *Dewsbury* and *Bradford* bonds.

The *Wakefield* bonds were given under sect. 58 of the *Wakefield Waterworks Act*, which enables the corporation to mortgage the district fund and incorporates, with regard to the mortgage of the district fund, the provisions contained in sects. 236 to 239 of the *Public Health Act*, 1875. It is said that by sect. 175 of the *Public Health Act*, 1875, the district fund is fed by realty, because the proceeds of the sale of surplus land are to be paid into it. Whether by reason of this a security on the district fund creates an interest or a charge upon land may be open to doubt. It is not necessary to decide the point in the present case, and I reserve to myself the full right to consider, when the proper occasion arises, the question whether it is possible to treat as an interest in land a security which only affects a fund arising in part from the sale of land which a statute directs to be sold. That question does not arise unless sect. 175 is a section which we can treat as bearing on these mortgages. Mr. *Cozens-Hardy* says it is not incorporated with the *Wakefield Waterworks Act*. It is not incorporated in terms; but I, like Lord Justice *Cotton*, somewhat doubt whether it is not a general provision that would apply to these mortgages without express incorporation. But the Respondents are met by another difficulty. Sect. 175 can only be invoked by them if there is surplus land, and it seems to me that their case breaks down because there is no proof that there is any surplus land.

I will say nothing more, except to mention that I entirely agree with the Lord Justice *Cotton* in holding that in the saving clause in sect. 92 the words "by virtue of any mortgage" apply only to existing rights, and not to prospective ones. That point seems to me to have been decided by Vice-Chancellor *Wood* in the case of *Arnold* v. *Mayor of Gravesend* (2), and his view has been lately affirmed in *Attorney-General* v. *Mayor of Newcastle-on-Tyne* (3).

(1) 43 Ch. D. 27, 37. (2) 2 K. & J. 574. (3) 23 Q. B. D. 492, 498.

I agree that the judgment below must be reversed as regards the four bonds before us.

FRY, L.J.:—

I also find myself unable to agree with the decision of the learned Judge. The questions in controversy here have ranged themselves around two funds—the one the borough fund of a municipal corporation, and the other a district fund created under the *Public Health Act*, 1875; and the question in each case is, whether a charge on this fund is, or is not, an interest in land, or a charge upon an interest in land.

Now, with regard to the borough fund, I must express my doubt whether, in any case, a charge on a fund which gives no right to go on anything except the money when it has got into the fund ever can be a charge upon real estate. It appears to me that money which comes from land in the form of rent, when it has been paid into a bank, or otherwise been realized in the form of cash, is pure personal property; and although a charge on that money, if it give in addition a right of going upon the land, may be a charge on realty, I, at least express a doubt whether a simple charge on the money when it has fallen into the fund ever can be an interest in realty. But it is not necessary to decide that point, for in the present case it appears to me that a charge on the borough fund of a municipal corporation is only a charge on the surplus balance of a fund arising, no doubt, partly out of the rents and profits of land and partly out of other sources, which from time to time remains after numerous payments have been made out of the fund. The balance of the fund after the application of part of it to prior charges is, in my opinion, pure personalty, and the person who is entitled to that and nothing more has no interest in the land.

Mr. *Browne* argued that the saving clause in sect. 92 of the *Municipal Corporations Act*, 1835, which saves the rights of all persons and bodies corporate in or upon any real or personal estate of any body corporate by virtue of any proceeding instituted before or after the passing of the Act, "or by virtue of any mortgage or otherwise," gave to the mortgagees whose titles were created subsequently to the Act a right against the fund in

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priority to the purposes mentioned in the section. But it is to be observed that, according to the ordinary functions of a saving clause, it saves existing rights; and it is not an enabling clause, and does not authorize the creation of new rights. Now, the right which Mr. *Browne* argued for is a right subsequently created. I think, therefore, that that clause has no application to the present case.

The considerations with regard to the district fund are, to a great extent, the same as those which apply to the borough fund; but there are two points of difference. In the first place, the district fund itself is not fed by rents and profits of land. So far, it is less favourable to his argument; but, on the other hand, there is a section which requires great attention, viz., the 175th section of the *Public Health Act* of 1875, because that directs that surplus lands shall be sold and the proceeds applied towards the discharge by means of a sinking fund or otherwise of any principal moneys that may be borrowed upon the security of the fund or rent. I shall not enter upon the construction of that section, on which many questions may arise, because it does not appear to me from the evidence that the *Wakefield* Corporation has any surplus land. I, therefore, shall abstain from inquiring whether a mortgagee might, if any surplus land existed, obtain by mandamus or otherwise a sale of such land, or whether, if he had such a right, that would create any interest in land. I leave those questions for further discussion if they should ever arise.

COTTON, L.J.:—

I think we ought to mention that the ground upon which we have decided this appeal does not seem to have been taken in the Court below, and the attention of the learned Judge was not directed to it.

Solicitors for Appellants: *Fowler, Perks, Hopkinson & Co.*

Solicitors for Plaintiff: *Torr, Janeways, Gribble, & Oddie,* agents for *Cranswick, Leeds.*

Solicitors for residuary legatees: *T. W. & T. B. Nelson,* agents for *Nelson, Eddisons, & Lupton, Leeds.*

H. C. J.

In re PORTER'S SETTLEMENT. PORTER *v.* DE QUETTEVILLE.

[1889 P. 385.]

C. A.
1890
NORTH, J.
April 23, 24.
C. A.
July 12.

Power of Appointment—Real Estate—Particular Power—Excessive Execution—General Words—Power to Appoint among Children in Tail—Appointment of Life Estate.

By a family partition deed of the 5th of September, 1837, a general power of appointment over real estate was given to a husband and wife. By a deed of the 9th of September, 1837, they exercised that power by appointing to themselves successively for life, with remainder to such of their children in tail, and in such manner, as they should by deed appoint, with remainder to the children as tenants in common in tail.

By a deed in 1855, after reciting the deed of the 5th of September, 1837, but not the deed of the 9th of September, 1837, and reciting their intention to exercise the power in the deed of the 5th of September, the husband and wife, in exercise of that power, "and of every other power or authority enabling them in that behalf," purported to appoint the property to themselves successively for life, with remainder to their son *E.* for life, with remainder over in favour of *E.*'s issue.

The husband and wife subsequently died, leaving several children besides *E.*

Held (affirming *North*, J.), that the power in the deed of the 9th of September, 1837, was not exercised by the deed of 1855: and further that the power authorized neither an appointment to *E.*'s issue (which was in fact admitted) nor an appointment of a life estate to E.

Per Lindley, L.J.:—A power to appoint real estate among children in tail does not authorize an appointment to one of those children for a lesser estate, such as an estate for life.

By a deed of family partition dated the 5th of September, 1837, certain real estates in *Wiltshire* were partitioned, part of them being conveyed, after the limitation of a life estate to one *Susanna Ludlow*, widow, since deceased, to the use of *John Gibbs*, his heirs and assigns, upon trust, by deed to convey the same to and for such uses and trusts as *William Porter* and *Elizabeth Gibbs Porter* his wife should by deed direct or appoint; and in default of and subject to such direction and appointment, upon trust for the said *Elizabeth Gibbs Porter*, her heirs and assigns.

By a deed of settlement dated four days afterwards, on the 9th of September, 1837, to which *William Porter* and *Elizabeth*

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Gibbs Porter were parties, and which was duly acknowledged by the latter, *W. Porter* and *E. G. Porter*, in exercise of the power given to them by the deed of the 5th of September, 1837, directed and appointed that the said remainders and remainder in fee simple immediately expectant on the decease of the said *Susanna Ludlow* of and in the hereditaments then subject to the said power, should thereby be conveyed by the said *John Gibbs* to *Robert Haynes* and *Thomas White* (parties thereto), their heirs and assigns, to the uses and upon the trusts thereinafter declared. And the said remainders and remainder in fee simple in the said hereditaments were thereby granted by the said *John Gibbs*, *William Porter*, and *Elizabeth Gibbs Porter* unto the said *R. Haynes* and *T. White*, their heirs and assigns, to the uses and upon the trusts thereinafter declared. And it was thereby agreed and declared that the said *R. Haynes* and *T. White*, their heirs and assigns, should stand seized of the said remainders and remainder and hereditaments thereby appointed, to the use of the said *Elizabeth Gibbs Porter* and *William Porter* successively for life, with remainder "to the use of such one or more exclusively of the others or other, if any, of the children of the body of the said *Elizabeth Gibbs Porter* by the said *William Porter* lawfully begotten, and the heirs of the body or of the several and respective bodies of such child or children respectively lawfully issuing, with such directions for maintenance, education, and advancement, and to be vested at such age or respective ages, or day or respective days, and upon such contingencies, and under and subject to such conditions and restrictions, and generally in such manner and form as the said *William Porter* and *Elizabeth Gibbs* his wife shall at any time or times and from time to time jointly during their joint lives by any deed or deeds, instrument or instruments in writing," to be sealed &c., "either absolutely or conditionally, and with or without power of revocation and new appointment, direct, limit and appoint; and in default of such direction, limitation, and appointment by the said *William Porter* and *Elizabeth Gibbs* his wife, jointly as aforesaid, then as the survivor of them shall at any time or times after the decease of the other of them, and as to the said *Elizabeth Gibbs Porter* notwithstanding her coverture

by any future husband, by any deed or deeds, instrument or instruments in writing," to be sealed, &c., "either absolutely or conditionally, and with or without power of revocation and new appointment, or by his or her last will and testament," to be signed, &c., "direct, limit, and appoint": and in default of and subject to any such appointment, "to the use of the child, if only one, or if more than one, then all and every the children of the body of the said *Elizabeth Gibbs Porter* lawfully begotten, equally to be divided between them, if more than one, share and share alike as tenants in common, and not as joint tenants, and the heirs of the body or several and respective bodies of the same child or children respectively lawfully issuing."

By a deed-poll dated the 10th of March, 1855, under the hand and seal of *William Porter* and *Elizabeth Gibbs Porter*, after reciting the partition deed of the 5th of September, 1837, and the said power of appointment therein contained over the hereditaments described in that deed, and the death of *Susanna Ludlow*, the tenant for life under that deed, it was recited as follows: "And whereas the said *William Porter* and *Elizabeth Gibbs* his wife are respectively desirous and have respectively determined, in pursuance of their aforesaid power, to limit and appoint the said hereditaments to the uses and in manner hereinafter expressed." Then it was witnessed that "the said *William Porter* and *Elizabeth Gibbs* his wife, in pursuance and in exercise and execution of the aforesaid power or authority for this purpose given to or vested in them by the hereinbefore-mentioned indenture of the 5th day of September, 1837, and of every other power and authority whatsoever enabling them in this behalf, do and each of them doth by this present deed," signed, sealed, &c., "direct and appoint that" the said hereditaments should thenceforth go, remain and be to the use of the said *Elizabeth Gibbs Porter* and *William Porter* successively for life, and after the death of the survivor, to the use of *Edward Endymion Porter*, the son of the said *William Porter* and *Elizabeth Gibbs Porter*, "for his life without impeachment of waste," and from and immediately after the determination of the several life estates thereinbefore limited, and in the meantime subject thereto, and to the power of jointuring thereinafter given to the

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said *Edward Endymion Porter*, to such uses, for the benefit of all or any one or more of the children and more remote issue of the said *E. E. Porter* (such more remote issue to be born within the period the law required as to perpetuity) and if more than one, in such shares as the said *E. E. Porter* should by deed or will appoint; and in default of and subject to any such appointment, to the use of the children of the said *E. E. Porter* as tenants in common in fee. And power was thereby given to the said *E. E. Porter* of appointing a jointure to any wife of his during her life.

Wm. Porter and *Elizabeth Gibbs Porter* had several other children besides *Edward Endymion Porter*.

Elizabeth Gibbs Porter died in 1876, and *William Porter* in 1887, leaving several children, including *Edward Endymion Porter*, surviving them.

Edward Endymion Porter married in 1871, and had several children, infants.

This was an originating summons taken out by *Edward Endymion Porter* and his children against his surviving brothers and sisters, to have it determined what was the effect of the appointment of the 10th of March, 1855, and whether or to what extent it was a valid appointment under the settlement of the 9th of September, 1837.

It was stated at the bar that the solicitor who prepared the deed of 1855 was not the solicitor who prepared the deed of the 9th of September, 1837; and it was supposed that he had no knowledge of the existence of that deed.

The summons was heard before Mr. Justice *North* on the 23rd of April, 1890.

Morshead (*Cozens-Hardy*, Q.C. with him), for the Plaintiffs:—

The appointments purported to be made by the deed of 1855 are not altogether avoided by reason of the fact that some of the attempted appointments are outside the powers which Mr. and Mrs. *Porter* had: *Whitby* v. *Mitchell* (1).

Here the appointments were expressed to be made, not only in exercise of the powers contained in the deed of the 5th of

(1) 42 Ch. D. 494.

September, 1837, but also in exercise of "every other power or authority whatsoever enabling them in this behalf," which words operate upon the powers contained in the deed of the 9th of September, 1837. Under that deed the appointors had power to appoint among their children in tail; and inasmuch as the greater includes the less, that would include power to give their children life interests.

Everitt, Q.C., and *W. D. Rawlins*, for the Defendants:—

The question whether a power has been exercised is a question of expression of intention to be gathered from the whole instrument set up as an exercise of the power: *In re Cotton* (1). The deed of 1855 was clearly not intended to be an exercise of the power given by the deed of the 9th of September, 1837, which deed is not even mentioned. We do not say that, if that deed had contained a power to appoint to the extent and in the way the appointment was expressed to be made so as to fall in with the scheme, that the general words in common form referring to every other power in that behalf enabling the appointors, the appointment would not have taken effect under the deed of the 9th of September, 1837. But, there is no magic in such general words to make the donees of a power do something they did not intend to do. Had the appointors had in their minds what their powers really were, there is nothing to shew or afford any presumption that they would have made the limited part (if any) of the appointment they attempted to make which was within their power. There was an attempt to carry out a scheme of family settlement, the scheme having failed, there can be no presumption of an intention that a fraction of the scheme should stand.

Further than that, a power to select which members of a class shall have estates tail does not authorize the giving a life estate only to a member of that class. A life estate is of so different a nature from an estate tail that it is not within the scope of the power.

Morshead, in reply.

(1) 40 Ch. D. 41.

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1890. April 24. NORTH, J. (after referring to the deeds of the 5th of September and the 9th of September, 1837, continued):—

Now the effect of the latter deed was this: There were successive estates for life to Mr. and Mrs. *Porter* with remainder to the children as tenants in common in tail, subject to a power in the parents or the surviving parent to select among those tenants in common in tail and appoint a person or persons so selected to take the entirety instead of all the children taking as tenants in common in tail as they would do in default of appointment. That was the scope of the deed. There is nothing whatever pointing in terms to any limitation of estates other than such estates as were pointed out by the deed, namely, the limitations to children, either under the power or otherwise, as tenants in common in tail. I do not see how under that deed there possibly could have been any appointment to a child in fee. The power did not extend beyond the tenancy in tail. I take it the tenancy in tail was the maximum interest that could be given.

Then it is suggested that a tenancy for life might be given. I am not sure that it could; but I am not going to decide it could not, because my decision does not turn on that point: but it must be borne in mind that seems to be the point which presses. The settlors had a liking apparently for tenancies in tail, and they determined that their children should have the property as tenants in common in tail subject to the power of selection, so as to enable the parents to select certain particular tenants in tail to the exclusion possibly of other children who otherwise would be tenants in tail.

Then we come to the deed of appointment of the 10th of March, 1855. It is a deed by Mr. and Mrs. *Porter*, who were both then alive, and it recites the deed of the 5th of September, 1837, that is to say, the deed of partition. Then, after a recital of the death of Mrs. *Ludlow*, the only other recital is this: "And whereas *William Porter* and *Elizabeth Gibbs* his wife are respectively desirous and have respectively determined, in pursuance of their aforesaid power, to limit and appoint the said hereditaments to the uses and in manner hereinafter expressed." Then it witnesseth that they, "in pursuance and in exercise and exe-

cution of the aforesaid power or authority for this purpose given to or vested in them by the hereinbefore-mentioned indenture of the 5th of September, 1837 "—followed by certain words which I omit for the moment—do appoint the property to the use of *Elizabeth Gibbs Porter* for her life. Now, pausing there, she had got that life estate already under the deed of the 9th of September, 1837, and why that should be repeated is not very clear. Then it goes on to limit a life estate to Mr. *Porter*. To that the same remark exactly applies. He already had an estate for life under the previous deed. And after the death of the survivor of them the property is limited to *Edward Endymion Porter*, who is one of the Plaintiffs in the action, and who was the second son of Mr. and Mrs. *Porter*, for his life without impeachment of waste. As to that, the power to give him an estate for life certainly was not expressly given by the previous deed, and I believe it is an open question whether such a power might have been created under it. Then, from and immediately after the determination of the said several life estates, and in the meantime subject thereto, and to the power of jointuring hereinafter given to *Edward Endymion Porter*, the deed goes on to appoint to his issue. A power of jointuring is subsequently given, but, I may as well say here as later that that clearly was not in any way authorized by the previous deed. There was no power of allowing *Endymion Porter*, if he could be made tenant for life, to confer a jointure upon a person who was not within the power. As to the appointment in favour of the issue of *Edward Endymion Porter*, it was conceded that it was beyond the limits of the power and could not have any effect given to it. It was obviously beyond the limits of the power for two reasons. In the first place, the persons in whose favour it is expressed to be exercised are a class that is too large, it goes beyond children, it includes issue also; and further also, it is a delegation of the power of selection which the person exercising the power in this way had no right to delegate to another person, whatever power they might have had to make such a selection themselves.

Looking at that settlement, if it contained nothing but the words I have read, it would be perfectly clear that it could not

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be in any way in exercise of the power contained in the deed of the 9th of September, 1837. Every indication would be against it, and there would not be any indication whatever that the power was being exercised. Above all things, the power in the deed of the 5th of March is very fully recited, and no reference whatever is made to the deed of the 9th of September or the power contained in it. I say "or the power contained in it" because there are some words in this deed that I have not yet referred to. They are to be found in the witnessing part, which says that Mr. and Mrs. *Porter*—"in pursuance and in exercise and execution of the aforesaid power or authority for this purpose given to or vested in them by the hereinbefore-mentioned indenture of the 5th day of September, 1837, and of every other power and authority whatsoever enabling them in this behalf" appoint, and so on. It is said the insertion of those general words there operates upon the power in the deed of the 9th of September because it is an indirect reference to that deed, and that under that deed there was power to give a life estate. I have very great doubts whether there was power to give a life estate only under that deed, looking at the express direction that the estates to be given are estates in tail; but, independently of that, I find in the deed of appointment of 1855 a great deal that cannot possibly be done under the deed of the 9th of September, 1837; the power to give a life estate is not expressly or impliedly given by the latter deed—not given at all, indeed, unless the power to give an estate tail included in it the power to give any lesser estate. There is a great deal in the deed of 1855 that could not possibly be contemplated by the earlier deed of the 9th of September, 1837, and there is also all omission of any reference whatever to the power in the deed of the 9th of September, which I am satisfied would have been recited if there had been any intention of exercising that power.

The conclusion I come to is that, notwithstanding the insertion of those words, "every other power enabling them in this behalf," those words are not intended—it is a question of intention—to make the execution of the deed of 1855 an execution of the power contained in the deed of the 9th of

September, 1837. It looks rather as if the deed of 1855 had been prepared deliberately with a view of leaving out of sight the deed of the 9th of September, 1837. I am told that it was prepared by a solicitor who knew nothing whatever about the deed of the 9th of September, and, therefore, as far as he is concerned, the deed of 1855 could never have been intended to operate as an exercise of the power in the earlier deed. Of course the solicitor's intention does not settle the matter; but, looking at the circumstances under which the deed of 1855 was executed and its contents, and above all the clear, full reference to the power in the deed of the 5th of September, and the entire omission of all reference to any power in the deed of the 9th of September, I am satisfied it was not the intention to exercise the power in the deed of the 9th of September by this deed. Accordingly there must be a declaration that the deed of 1855 did not operate as an execution of the power in the deed of the 9th of September, 1837.

D. P.

C. A.

From this decision the Plaintiff, *Edward Endymion Porter*, appealed.

The appeal was heard on the 12th of July, 1890.

Cozens-Hardy, Q.C., and *Morshead*, for the Appellant:—

We submit that the general words in the deed of 1855 operated as an exercise of the power in the deed of the 9th of September, 1837. We admit, however, that the appointment, so far as it purports to be in favour of the children or remoter issue of *Edward Endymion Porter*, is beyond the limits of the power, and therefore cannot be supported; but we say that the appointment of a life estate to *E. E. Porter* is good, the property going, subject to that appointment, to all the children of *William Porter* and *Elizabeth Gibbs Porter*, as tenants in common in tail under the ultimate limitations of the deed of the 9th of September, 1837. It is settled by *Alexander* v. *Alexander* (1) that, as regards personal estate, a power to appoint among children is well exercised by appointing a particular interest, as for life, to one of them;

(1) 2 Ves. Sen. 640.

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and *Thornton* v. *Bright* (1) is an authority that the rule is applicable to real estate. A power to appoint an estate tail involves a power to appoint a lesser estate, such as an estate for life. The several deeds of the 5th and 9th of September, 1837, and 10th of March, 1855, should be regarded as one transaction—as a family resettlement of the property comprised in those deeds. The governing idea of the deed of 1855 was to exercise whatever powers were then vested in the appointors by the previous deeds, though by an oversight the deed of the 9th of September, 1837, was not recited. The Court should give effect to what must have been the manifest intention of the donees of the powers.

Sir *Horace Davey*, Q.C., *Everitt*, Q.C., and *W. D. Rawlins*, for the Respondents, the Defendants, were not called upon.

COTTON, L.J.:—

The question we have to decide is, whether there was a good appointment by the deed of 1855; and I think the learned Judge was right in saying there was not.

How does the case stand? By the deed of the 5th of September, 1837, a general power of appointment was given. Then the deed of the 9th of September, 1837, exercised that general power by giving a power of appointing the property in a particular way; but the power of appointment contained in that deed did not authorize what was desired to be done by the deed of the 10th of March, 1855. To my mind, we cannot come to the conclusion —and we ought not to do so—that there was any intention at all to exercise the power contained in the deed of the 9th of September. The appointment purporting to be made by the deed of 1855, is "in pursuance and in exercise and execution of the aforesaid power or authority for this purpose given to or vested in them"—the appointors—"by the hereinbefore-mentioned indenture of the 5th day of September, 1837, and of every other power and authority whatsoever enabling them in this behalf."

By some mistake or other—one does not know how it was—the appointors do not, on the face of this deed of 1855, profess to

(1) 2 My. & Cr. 230.

execute the power of appointment given by the deed of the 9th of September, 1837, but only the power given by the deed of the 5th of September. Therefore, in my opinion, we cannot come to the conclusion, having regard to what was purported to be done by the deed of 1855, that they intended by the words I have read, to exercise the power contained in the deed of the 9th of September, and therefore we cannot hold that there was even a life estate given to the Appellant in this case. In my opinion the appeal fails.

LINDLEY, L.J.:—

I am very sorry I have to come to the same conclusion. I say I am sorry, because it looks as if there was a blunder, and if I could correct it properly I should be disposed to do so.

In addition to the observations made by Lord Justice *Cotton*, with which I entirely agree, it appears to me that no one of the appointments in the deed of 1855 is warranted by the power contained in the deed of the 9th of September, 1837. I do not think it is right or possible to hold that the appointment of the life estate is warranted by that power. As I understand that power, it is a power to appoint in tail, neither more nor less, among such children—of course children only—as the appointors may select. I do not think the power of appointment warrants the power to appoint for life. The real truth is, that the power contained in the deed of the 9th of September was omitted to be exercised by an oversight, but unfortunately the blunder cannot be put right. I think the decision of the learned Judge was right, and that the appeal must be dismissed.

FRY, L.J.:—

I agree.

Solicitors: *Tylee & Co.; Robbins, Billing & Co.*

G. I. F. C.

C. A.
1890
NORTH, J.
Feb. 11, 12.
C. A.
May 2, 5, 8; *July* 14.

MARQUESS OF NORTHAMPTON *v.* POLLOCK.

[1888 N. 944.]

Mortgage—Policy of Insurance—Right to Policy Money—Fetter on Redemption.

An insurance society advanced £10,000 to *C.* on the security of a reversionary interest to which *C.* was entitled contingently on his surviving *W.* In accordance with the contract between the parties, the society insured the life of *C.* against that of *W.* for £34,500 in their own office, and provided the premiums down to the death of *C.* The reversion was charged with principal, premiums, and compound interest on principal and premiums. It was stipulated that in the event of *C.* dying in the lifetime of *W.*, the proceeds of the policy of insurance should belong to the society absolutely. *C.* died in the lifetime of *W.*:—

Held, by the Court of Appeal (*dissentiente* Bowen, L.J.), affirming the decision of North, J., that the stipulation was void, and the administrator of *C.* was allowed to redeem the £34,500.

Potter v. *Edwards* (1) distinguished.

THE Plaintiff in this action was the administrator of the late Earl *Compton*. The Defendants were *Henry Pollock*, *John Charles Salt*, and Sir *Henry Whatley Tyler*, trustees of the *National Life Assurance Society*.

In the year 1879, the Defendants, as such trustees, advanced to Earl *Compton* the sum of £10,000 on the security of a charge on certain real estates in *Scotland* to which he was entitled to succeed as heir of entail if he survived his father, the Plaintiff; and of a policy of insurance for £34,500 on the life of Earl *Compton* against the life of his father. Accordingly Earl *Compton* executed a bond in Scotch form, dated the 26th of May, 1879, whereby, in consideration of the sum of £10,000 then advanced and paid to him by the Defendants, he bound himself, his heirs, executors and administrators to make payment to the Defendants of the sum of £10,000, at Martinmas, 1879 (with a fifth part more of liquidate penalty in case of failure), and interest on the said sum at 5½ per cent. per annum, and thereafter half-yearly during the nonpayment of the principal sum to pay interest at the rate aforesaid. And he also bound himself, so long as the said

(1) 26 L. J. (Ch.) 468.

principal sum or any part thereof should remain unpaid, to pay the premiums on the said policy of assurance for £34,500, and that in case of default it should be in the power of the Defendants to pay the said premiums themselves and to charge the amount so paid against him in like manner as the principal sum. And in security of the personal obligation therein contained he charged his reversionary interest in the said land in manner therein mentioned.

As part of the loan transaction a minute of agreement of even date was signed by the Defendants of the first part, and Earl *Compton* of the second part, which provided as follows :—

"First. The first party shall effect a policy or policies of assurance on the life of the second party as against that of the said most noble marquess, his father, to the extent of £34,500, with such assurance company or companies as they may select, and that in such terms as to them shall be deemed advisable.

"Second. The interest payable on the said advance of £10,000, and the premiums payable on the said policy or policies of assurance, shall be allowed to accumulate for a period of five years, that is to say, till the term of Whitsunday, 1884, and compound interest with half-yearly rests at the rate of 5½ per cent. per annum shall be charged thereon.

"Third. On the expiry of the said period of five years, it shall be in the power of the first party, in the event of said advance of £10,000, premiums of assurance, interest, and others accumulated as aforesaid, not having been paid to them by the second party, forthwith to exercise their full powers and privileges conferred on them hereunder, or under said bond and disposition, in security, and in the event of their not exercising their powers and privileges, they may continue to pay said premiums and interest as before provided, and the principal sum, premiums, interest, and others, may be allowed to accumulate as aforesaid, and that so long as the said first party may think proper to do so, and the first party shall be entitled to use all diligence against the person or estate of the second party for payment of the interest or premiums paid by them after the expiry of the period of said five years, and that without prejudice to the powers and privileges in regard to any sum due by the second party

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before or otherwise. And it is hereby agreed between the parties that a statement under the hand of the first party, or any person duly appointed by them for that purpose, and certified by them or him as correct, shall be sufficient and conclusive evidence of the amount due by the second party to the first party as at the date of said certified statement. And it is hereby provided that in making up said statement the first party shall be entitled to include therein all expenses incurred in connection with said advance, and also interest at the rate of 3 per cent. on the amount repaid to them from the date of payment till the first term of Whitsunday or Martinmas thereafter in the event of said amount being paid between terms.

"Fourth. In the event of the second party not having paid to the first party the whole sums due by him to them before the death of the said most noble marquess, his father, then the policy or policies of assurance effected by the first party as aforesaid shall belong absolutely to the first party, and neither the second party nor his representatives shall have any claim or right thereunder in any manner of way, and the first party shall be entitled to exercise their full powers and privileges under the said bond and disposition in security as if no such policies had been effected.

"Fifth. In the event of the second party paying the first party before the death of the most noble marquess, his father, the whole sums due to them, the first party shall be bound forthwith to assign said policy or policies of assurance to the second party, but that always at his own expense.

"Sixth. In the event of the second party predeceasing the said most noble marquess, his father, and without having paid the first party the whole sums due to them, the first party shall prepare a statement certified as aforesaid, and made upon the principle before specified, shewing the amount due as at the date of the death of the second party, and they shall be bound to impute to the amount as brought out in said statement the whole sums of money they may receive in respect of said policy or policies of assurance, and in the event of said sums so received exceeding the amount due under said statement to account for and pay over the difference or excess to the representatives of the

second party entitled to receive the same. And in the event of the sums so received being inadequate to meet the amount brought out in said statement, then the first party shall have full right to exercise the powers and privileges conferred on them under said bond and disposition in security to recover from the means and estate of the second party the balance due to them after deducting all expenses and any excess interest which may be charged in respect of said sums not being paid to the first party until a certain time after proof of death of the second party, and also of interest at the rate of 3 per cent., as provided in art. 3 thereof, in the event of said amount being paid between terms."

A supplementary agreement, dated the 14th of June, 1879, was executed between the Defendants of the one part, and the then Earl *Compton* of the other part. It recited the sixth clause of the minutes of agreement of the 26th of May, 1879, and then proceeded: "And whereas the said last-mentioned clause does not accurately state the terms upon which the said advance of £10,000 was agreed to be made, it having been agreed that the policy or policies to be effected upon the life of the said Earl *Compton* against that of his father, the Marquess of *Northampton*, and in the event of his death before his father without having repaid all the principal moneys, interest, and costs due to the said *Henry Pollock*, *John Charles Salt*, and Sir *Henry Whatley Tyler*, and the sums thereby assured, should belong absolutely to the said *Henry Pollock*, *John Charles Salt*, and Sir *Henry Whatley Tyler*, or the survivors or survivor of them, or the executors or administrators of such survivor or their or his assigns: Now these presents witness that in consideration of the said advance being made to the said Earl *Compton*, it is hereby agreed and declared by and between the said parties hereto that in the event of the said Earl *Compton* predeceasing his father, the Marquess of *Northampton*, without having paid all principal moneys, interest, and costs due to the said *Henry Pollock*, *John Charles Salt*, and Sir *Henry Whatley Tyler*, under or by virtue of the bond in the said recited agreement mentioned, that then and in such case the policy or policies, and all moneys thereby secured, shall belong absolutely to the said *Henry Pollock*, *John*

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Charles Salt, and Sir *Henry Whatley Tyler*, or the survivors or survivor of them, or the executors or administrators of such survivor or their or his assigns. And it is further agreed that in consideration of the premises, the said Earl *Compton* shall, whenever called upon so to do, execute any further or other assurance for the purpose of carrying out at his own expense this agreement."

The Defendants took out a policy in the *National Life Assurance Society* on the life of the late Earl *Compton* against the life of his father, dated the 15th of May, 1879, for £34,500, at the annual premium of £431 5*s*. Nothing was ever paid by the late Earl *Compton* in respect of interest, premium, or principal.

The policy was kept up by entries in the books of the *National Life Assurance Society*. The sum insured was treated as paid to the society by entries in their books. There was nothing before the Court to shew whether any re-insurance had been effected.

Earl *Compton* died on the 5th of September, 1887, intestate, in the life of his father, who took out administration to his estate.

The Plaintiff claimed a declaration that the Defendants were entitled to the policy of assurance, and the sums assured thereby, as security only; a declaration that the agreement of the 14th of June, 1879, was void; redemption accounts and inquiries, and payment of the balance of the sums received on the policy after deducting what should be found due on taking the account with interest.

A defence and reply had been put in. The point of law raised by the pleadings was that the agreement of the 14th of June, 1879, "is not valid in law, and does not bind the Plaintiff, on the ground that it is an agreement limiting a mortgagor's right of redemption to his lifetime."

The action came on for hearing before Mr. Justice *North* on the 11th of February, 1890.

Crackanthorpe, Q.C., and *Reginald Winslow*, for the Plaintiff:—

The insurance was taken out as part of the security. The premiums were paid at the expense of Earl *Compton*. They were, in effect, borrowed on the security of his reversion. They were

in exactly the same position in principle as if Earl *Compton* had borrowed them from a third person, that third person participating *pari passu* in the security. Moreover, the office cannot say they paid the premiums, for nothing passed. There was a mere book entry: *Brown* v. *Price* (1).

The policy and insurance money, therefore, belonged to Earl *Compton*, except so far as they were taken away by the contract with the Defendants. It will hardly be set up that there was a conditional sale to bring the case within such decisions as *Williams* v. *Owen* (2); *Goodman* v. *Grierson* (3).

The stipulation that in the event of the death of Earl *Compton* in the lifetime of his father, the policy should belong to the society absolutely, is a stipulation in derogation of his right to redeem, and is therefore void, on the old principle of equity, the very foundation of all rights of redemption, that every provision for a forfeiture in a transaction which is really entered into to give security for a loan is void—in other words, a fetter cannot be imposed on a right to redeem: *Howard* v. *Harris* (4); *Jennings* v. *Ward* (5); *Toomes* v. *Conset* (6); *Spurgeon* v. *Collier* (7); *Lea* v. *Hinton* (8), approved in *Freme* v. *Brade* (9); *Drysdale* v. *Piggott* (10); *Courtenay* v. *Wright* (11). Policies of assurance where the mortgagee has paid the premiums are subject to the equity: *Holland* v. *Smith* (12); *James* v. *Kerr* (13).

Edward Beaumont (Sir *Horace Davey*, Q.C., with him), for the Defendants:—

We do not dispute the doctrine that once a mortgage always a mortgage, and that you cannot impose a fetter upon a right to redeem. In the first place, the stipulation under which the Defendants resist the claim is not within the mischief of the rule as laid down in *Spurgeon* v. *Collier*, the object of the rule being to protect the needy from greedy and designing persons;

(1) 4 Jur. (N.S.) 882.
(2) 5 My. & Cr. 303.
(3) 2 Ball. & B. 274.
(4) 1 Vern. 190.
(5) 2 Vern. 520.
(6) 3 Atk. 261.
(7) 1 Eden. 55.
(8) 5 D. M. & G. 823.
(9) 2 De. G. & J. 582, 595.
(10) 8 D. M. & G. 546.
(11) 2 Giff. 337, 351.
(12) 6 Esp. 11.
(13) 40 Ch. D. 449.

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for here the borrower has received from the lender £10,000 in hard cash, neither he nor his estate has paid anything, and it is sought to extract a further large sum of money from the persons who made the advance and have received nothing.

[NORTH, J.:—What is there to prevent the office from bringing an action on the covenant against the administrator?]

There is not the slightest intention to bring any such action, and there never has been. The Defendants are quite willing to give up any right they may have in that respect.

These policy moneys are really no part of the security. Earl *Compton* had no right to the policy at all, except under the contract. He, or rather his representatives, cannot approbate and reprobate; he must either take the benefit of the insurance in accordance with the contract, or not at all. If the bargain is to be set aside, there must be *restitutio in integrum*. The policy was taken out and kept up by the Defendants for their own protection, and they are absolutely entitled to it: *Pennell* v. *Millar* (1); *Brown* v. *Freeman* (2).

Crackanthorpe, in reply:—

There is no hardship whatever on the insurance office, the transaction is to be looked at exactly in the same way as if they had insured entirely in other offices and received the £34,500 in cash. They insured in their own office for their own purposes of profit. They have derived the benefit of that transaction as part of their insurance business; they derive loss on some insurance transactions but on the balance they obtain their profit. The estate of Earl *Compton* as mortgagor is not to be prejudiced by the way the mortgagees act for their own purposes.

NORTH, J.:—

I think in this case, on the whole, the Plaintiff is entitled to relief.

An arrangement was made between Earl *Compton* on the one hand and the insurance society on the other, through the medium of certain persons who are trustees for it, that he was to receive

(1) 23 Beav. 172, 183. (2) 4 De G. & Sm. 444.

an advance of £10,000, that a policy was to be effected in the names of the trustees, with any office this society might select. They selected their own office, and it was effected therefore in the names of the trustees of that society. The arrangements for effecting the policy provided that the premiums for the first five years were not to be paid by Earl *Compton*, but the insurance office were to pay them; and then there were certain provisions with respect to redemption. The policy was to be on the life of Earl *Compton*, who was entitled to a reversionary interest in certain real estate, and in the event of his surviving his father the advance was charged upon that reversionary interest, and the object of the policy was to provide a fund out of which the lenders might be paid in the possible event of their security not taking effect by the death of the borrower in the lifetime of the father. Then as I say, part of the bargain was that the office was to find the money for the premiums for the first five years. In my opinion the result of the transaction must be taken to be exactly the same as if this society had selected another office as that in which the policy should be effected. If it had been effected with another office, on the death of Earl *Compton* this office, or its trustees, would have received the total amount insured and have had the £34,000, or whatever the sum was, actually in hand. They chose themselves to effect the risk in their own office. It was unfortunate for them, because the risk has turned out to be a bad one, Earl *Compton* dying young; but it is only one transaction of many transactions of the same sort in which they engage; upon the result of the whole of which, unless they are very unfortunate, there will be not a loss, but a profit. This therefore is not from their point of view an isolated transaction at all, and their position in point of law is the same as if, instead of effecting it with their own office, the insurance had been effected actually with another office. The result would be, if that had been done, on the death of Earl *Compton* this money would have been received; and the question would be to whom the surplus belonged after applying it for the purpose for which it was effected, viz., securing the insurance office everything that was due to them under the security, for principal, interest, and costs, and whatever they had paid for premiums: and no doubt

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there would be a considerable surplus left after all those sums were satisfied.

This transaction was from beginning to end, in my opinion, a mortgage transaction, and nothing else. Looking at the whole transaction I have not the least doubt that it was and was intended to be a borrowing of money by Earl *Compton*, which he covenanted to repay, for which he gave security, and for which the lenders of the money had the security, either of the land or the proceeds of the policies, as the event might turn out, and they were intended to be repaid in that way.

Then there are certain provisions made as to redemption, and then there is this peculiar provision, only found in the instrument bearing date the 14th of June, 1879, in which there is a memorandum of what was the bargain between the parties from the first. Unfortunately the original bond did not correctly express that bargain, and the minute of arrangement which was drawn for the purpose of correcting it was itself insufficient to substitute what was right for what was wrong, and merely substituted one wrong thing for another, and it was not until the last memorandum of the 14th of June that there was really expressed what was the bargain of the parties at the time the advance was made. [His Lordship read the agreement of the 14th of June, 1879, and proceeded:—]

Now Earl *Compton* in point of fact never did pay any premium. According to my view of the agreement the society were bound to effect the policy, and they were bound to find the premiums for the first five years; and although they may not have been bound to do it afterwards, they at any rate had the option of doing it; and had the right to charge the premiums so paid with interest against the security, the policy moneys, or the land, as events might turn out; and in point of fact they did make the advance, and the policy was kept up; and the money would, if it had been effected in another office, actually have been received; and being effected with the same office it must be taken to be now in their hands. It is said that there is a difficulty by reason of the fact that Earl *Compton* never himself did advance any part of the premiums, and Mr. *Beaumont* very fairly admitted that he would have been placed in a difficulty if even one premium had

been paid by Lord *Compton*. I do not wish to treat what he admitted as prejudicing his client at all, because he said there was another way out of the difficulty in that case; but the distinction between the case of Earl *Compton* having advanced something and having advanced nothing was admitted, and the fact that he had not actually paid anything was relied on here. In my opinion that does not make any difference. If the bargain had been that he, from the first, was to pay the premiums, and if he had gone to the office and said, "I have not the money here, will you advance it for me, I will repay you," and they had done so, this would have been a payment by him; and when, without going through that form, it was agreed between them that the premiums should be provided by the office for him, and they should be his creditors for the amount, his position in respect to the policy was exactly the same as if instead of that agreement being acted on he had actually found the money.

Under those circumstances, I take it, there was a mortgage transaction between the parties, as part of which a policy was effected on the responsibility and on the credit of Earl *Compton*, although in point of fact the cash for the premiums is advanced by the society. In point of fact it never was advanced at all, because the whole arrangement was a book-keeping matter; but he was liable to them for the premiums, and he had the same rights in respect of the policy as if he had, instead of borrowing the premiums, paid them in cash. Under those circumstances it is a mortgage transaction which has to be worked out in some way or another. It seems to me that, this transaction standing, the society has the legal right to sue Earl *Compton's* representatives for the advance that was made. Mr. *Beaumont* says that the insurance society have never contemplated doing anything of the kind, but I cannot test the rights of the parties by any intention they may have, if it is distinct from or raises any question as to the legal rights of the parties; and it seems to me as the bargain stands they have a right at this moment (if it is binding) to sue for the return of the money; and, if the contract is not binding, if it were set aside altogether, they would be creditors of Earl *Compton's* estate for the money so advanced and have a right to sue him for so much money lent.

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Then we come to the terms of redemption. His representative says he admits his liability, and that an account must be taken of what is due, and the insurance society must have full credit for everything due to them; but then the question is as to the policy moneys. As to that the insurance society rely on this particular clause, which says that in a certain event the policy is to be the property of the society. It is a very startling clause, because it comes to this, that if, in point of fact, Earl *Compton* had paid all the principal, interest, and costs, the policy would be his; but if he paid all the principal, and if he paid all the interest, but by reason of a bill of costs not having been delivered, costs had not been all paid, the policy moneys would be out and out the property of the insurance company. In my opinion a provision of that sort in a mortgage transaction is one the law does not recognize, and would not give effect to; and the result is that I must treat it as not giving them an absolute title, but giving them a title to the policy moneys as part of their security and nothing else. The case Mr. *Beaumont* puts of the policy being entirely outside the transaction does not seem to me to be so. There is a bargain existing between the parties, and the policy is a part of the subject of that transaction; and I think that the surplus arising from it belongs to the mortgagor or his representative after all the liabilities have been paid. I quite appreciate what Mr. *Beaumont* says about the hardship of asking the society, who have paid Earl *Compton* £10,000, and have never had a farthing from him, to be asked to pay him something more; but that hardship disappears altogether, when one recollects that this transaction was one of many, and if they had effected the policy with another society they would have had money in their hands to repay themselves the amount advanced for yearly premiums and interest upon them; and it is only when this is borne in mind that the parties can see what their rights are.

It seems to me that under these circumstances an account must be taken, if necessary. The parties may possibly settle the figures amongst themselves; but the order I must make is to take proper accounts, of what is due to the society under their security, on the one hand; and from the society in respect of the policy

moneys, on the other; and declare that notwithstanding the provisions of the agreement the legal representative of Earl *Compton* is entitled to the surplus remaining in the hands of the society in respect of the policy moneys.

D. P.

From this judgment the Defendants appealed. The appeal came on to be heard on the 2nd of May, 1890.

Sir *H. Davey*, Q.C., *Rigby*, Q.C., and *E. Beaumont*, for the Appellants:—

There is no dispute as to facts; the point is one of law, whether the stipulation in question is invalid as limiting a mortgagor's right to redeem. We contend that the transaction was not one of mortgage, it was a special bargain that if Earl *Compton* paid certain sums during the life of his father the policy should belong to the Earl, but if he did not it should belong to the Appellants. If this decision stands Lord *Compton's* estate gets £25,000 for which he has not paid a penny—a very strange result of what is called an equitable doctrine.

[LINDLEY, L.J.:—If you succeed do you say that the debt is extinguished?]

Yes; we so construe the documents. If Lord *Compton* dies before his father the policy money becomes payable. The company then, by the original agreement, have to account, and cannot come on Earl *Compton* unless the policy-money is insufficient. The supplemental agreement makes the policy ours, but the rest of the bargain remains, and the money being sufficient we have no further claim. What is there against law in the supplemental agreement? The Court below and our learned friends on the other side assume this policy to be property of Earl *Compton* which he mortgaged. It was not; it was a policy created for the purposes of this special agreement. If the company had acquired property of Earl *Compton* as mortgagees, the principle that the security could not be made irredeemable must have been fully carried out, but the policy never was his. Equity of redemption is a right to get back a man's own property which he has mortgaged. If, by way of collateral

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security a policy is taken, the premiums on which the mortgagor covenants to pay, an equity of redemption is presumed; but we say that the parties may deal as they please with a policy which is taken out solely in pursuance of a special contract, and the terms of that contract must govern the rights. Is there any other principle preventing an agreement that in certain events such a policy shall belong to the persons who advanced the money? The stipulation is in the nature of a bonus, but parties may stipulate for a bonus—there being now no law against usury. The equitable rule relates only to a borrower's right to get back his own property. This case is almost on all fours with *Potter* v. *Edwards* (1), approved of and followed in *Mainland* v. *Upjohn* (2), and is, in fact, a stronger case. The rule "once a mortgage always a mortgage" only comes to this, that where the stipulation is, that if a debt is repaid on a certain day the mortgagee will reconvey, the parties must be taken to have intended that there shall be redemption after that day on equitable terms: *Howard* v. *Harris* (3). None of the cases on policies go beyond this, that where a policy is taken out without any express bargain, it shall be presumed to be subject to the same equity of redemption as the mortgaged property; none go to this length that the parties cannot agree to the contrary. What is to be looked to is, what was the bargain?: *Goodman* v. *Grierson* (4); *Scottish Union Insurance Company* v. *Marquis of Queensberry* (5). The principle of giving an equity of redemption was relief against a penalty. In *Bonham* v. *Newcomb* (6), there being a special bargain that there should be power to redeem during a life, redemption afterwards was refused, and this was affirmed by the House of Lords. Here there is a bargain as to acts being done during a life, and the same principle applies. Earl *Compton's* representatives seek to approbate and reprobate, and to reprobate after it has become impossible to restore the parties to their former position. This cannot be unless the cases are too strong to be got over. The Respondents lay down two propositions: (1.) that wherever a policy is effected and a liability to pay the

(1) 26 L. J. (Ch.) 468.
(2) 41 Ch. D. 126, 143, 144.
(3) 1 Vern. 33, 190.
(4) 2 Ball. & B. 274, 279.
(5) 1 Bell App. Cas. 183.
(6) 2 Vent. 364; 1 Vern. 232.

premium is imposed on the mortgagor, it is to be treated as the mortgagor's policy; and (2.) that this policy being therefore Lord *Compton's* mortgaged property any proviso qualifying his right to redeem it is to be rejected. The argument halts at every step. *Drysdale* v. *Piggott* (1), and *Freme* v. *Brade* (2) were referred to—they were cases in which from the payment of premiums being thrown on the mortgagor the Court drew the inference that the policy was to be his; but no case has been cited where, when there is an express stipulation how the policy shall go, the liability of the mortgagor to pay premiums has been held to control it. There is, no doubt, a rule that the right to redeem cannot be fettered, but to make that rule apply you must first establish that the property is the mortgagor's property. Here the property is the creature of the agreement. The policy is a policy in the names of the trustees. The Plaintiff cannot shew a shadow of title to it except by reading the contract, the terms of which are the law of its being, and must govern its destination.

Crackanthorpe, Q.C., and *Reginald Winslow*, for the Plaintiff:—

The Appellants say, that as regards the policy this is not a mortgage, but a special contract as to something which never belonged to the mortgagor. This is inconsistent with the stipulation in the agreement of the 14th of June that in certain events the policy should belong to the Appellants, for whose was it before? Then, as to the agreement furnishing the law of being of the policy, the fact cannot be overlooked that there are several documents, and they must be construed together like a will and codicils. The policy is the first document. After the policy comes the agreement which provides that a policy shall be effected—it was all one arrangement. Then comes the bond which has all the characteristics of a mortgage—an obligation to pay the principal sum, to pay interest, to pay the premium on the policy, and gives power to the lenders to pay the premiums and add them to the principal.

[COTTON, L.J.:—I do not doubt that it was a mortgage

(1) 8 D. M. & G. 546. (2) 2 De G. & J. 582.

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transaction, but the question is whether the equitable rule applies to what was not the mortgagor's own property.]

It must be treated as his, since he is bound to pay the premiums. The liability to pay the premiums is enough to determine the question: *In re Leslie* (1); *Falcke* v. *Scottish Imperial Insurance Company* (2). The company contend that they are not mortgagees because they cannot foreclose during Lord *Compton's* life. But if clause 6 be borne in mind, it will be seen that clause 5 is not put in to extend the time for redemption but to provide for the policy being assigned if redeemed. There is no negation of the right to foreclose but only an assertion of the right to redeem. There is nothing to extinguish the liability of Earl *Compton's* estate to pay the debt. *Potter* v. *Edwards* (3); and *Mainland* v. *Upjohn* (4), are relied on by the Appellants, but they were different cases from the present. They do not decide that the right of redemption may be clogged or extinguished as the Appellants contend it may be, but only that a bargain may be made giving a mortgagee a bonus on his advance; which is quite a different thing from implying the extinction of the debt. But if those cases are applicable, they are contrary to the current of authority.

The two questions are, first, was there a mortgage of the policy, and if so, has that mortgage become irredeemable? And, secondly, where there are side by side a mortgage of realty and a collateral security upon a policy of assurance, is there any equitable rule under which, while the former retains its redeemable character, the latter can be made irredeemable? Earl *Compton* bound himself to pay the premiums on the policy, so long as the principal money remained unpaid; and we contend that there was a mortgage; that the principle "once a mortgage always a mortgage" applies; and that if the mortgage was redeemable during Earl *Compton's* life, redemption could not be withheld after his death. No agreement or stipulation between mortgagor and mortgagee can make a mortgage irredeemable: *Courtenay* v. *Wright* (5). The equity of redemption on a mortgage can only

(1) 23 Ch. D. 552.
(2) 34 Ch. D. 234, 248, 252.
(3) 26 L. J. (Ch.) 468.
(4) 41 Ch. D. 126.
(5) 2 Giff. 337.

be extinguished by foreclosure; and when personal property such as a policy of assurance is mortgaged as a collateral security, side by side with real estate as was the case here, the mortgagee cannot under any circumstances say that the policy is irredeemable. If a mortgage is a mortgage for one party it is a mortgage for both: *Goodman* v. *Grierson* (1). In *Toomes* v. *Conset* (2) it was argued that a collateral security had become irredeemable by length of time and other considerations, and it was laid down by Lord *Hardwicke* that the "Court will not suffer, in a deed of mortgage, any agreement in it to prevail, that the estate become an absolute purchase in the mortgagee upon any event whatsoever"; so also in *Jennings* v. *Ward* (3), it was said, in 1705, by the then Master of the Rolls, "A man shall not have interest for his money on a mortgage, and a collateral advantage besides for the loan of it; or clog the redemption with any by-agreement." In *Spurgeon* v. *Collier* (4) Lord *Northington* says (5): "A man will not be suffered in conscience to fetter himself with a limitation or restriction of his time of redemption." A collateral advantage to a mortgagee clogging the redemption is contrary to law. This rule was not affected by the repeal of the usury laws: *Broad* v. *Selfe* (6); and was recently recognized as unimpaired by Mr. Justice *Kay*, in *James* v. *Kerr* (7).

[BOWEN, L.J., referred to *The Protector Endowment Loan and Annuity Company* v. *Grice* (8).]

The Court held that the instalments claimed in that case were payable not by way of penalty, but as an essential part of the contract. Every point that the other side can urge as being present in this case was present also in *Howard* v. *Harris* (9), where it was held that no agreement in a mortgage can make it irredeemable after the death of the mortgagor.

The language of the agreement in this case must be borne in mind. The third clause of the first agreement expressly states

(1) 2 Ball. & B. 274.
(2) 3 Atk. 261.
(3) 2 Vern. 520.
(4) 1 Eden, 55.
(5) 1 Eden, 59.
(6) 11 W. R. 1036.
(7) 40 Ch. D. 449.
(8) 5 Q. B. D. 592.
(9) 1 Vern. 190.

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that the mortgagees are to be entitled to exercise the powers conferred upon them without prejudice to the powers and privileges in regard to any sum due by the mortgagor before or otherwise. The cases of *The Scottish Union Insurance Company* v. *Marquis of Queensberry* (1), *Knox* v. *Turner* (2), *Gottlieb* v. *Cranch* (3), and *Bruce* v. *Garden* (4), are all cases of conditional purchase in which the relation of debtor and creditor did not subsist after the contract.

The question whether the insurance was effected in their own or in any other office, and whether Lord *Compton* did or did not pay the premiums himself does not affect the case.

The statement that Earl *Compton* obtains a double benefit arises out of a fallacy. There were two contracts, a contract of borrowing and lending, and a contract of assurance. It is not the fact that the insurance company have not received a penny. They have received everything to which they are entitled under their contract of borrowing and lending; their loss, if any, arises out of their contract of assurance, and they are, in fact, seeking to repudiate part of their insurance risk.

These policy moneys are property created by our payments which ought to be delivered over to us after satisfying to the mortgagees all they are entitled to in the shape of principal, interest, and costs, upon the principle that where the creditor has agreed to effect a policy on the debtor's life, and the debtor has agreed to pay the premiums, the debtor is entitled to the policy on payment of the debt: *Holland* v. *Smith* (5); *Morland* v. *Isaac* (6); *Drysdale* v. *Piggott* (7); *Williams* v. *Owen* (8); *Bruce* v. *Garden*; *Coote* on Mortgages (9); *Goodman* v. *Grierson* (10); *Field* v. *Hopkins* (11); *Wallingford* v. *Mutual Society* (12).

The decision from which the appeal is brought is founded on a current of authority extending over 200 years, and never departed

(1) 1 Bell. App. Cas. 183.
(2) Law Rep. 5 Ch. 515.
(3) 4 D. M. & G. 440.
(4) Law Rep. 5 Ch. 32.
(5) 6 Esp. 11.
(6) 20 Beav. 389, 394.
(7) 22 Beav. 238; 8 D. M. & G. 546.
(8) 5 My. & Cr. 303.
(9) 4th Ed. p. 26.
(10) 2 Ball & B. 274.
(11) 44 Ch. D. 524.
(12) 5 App. Cas. 685.

from except in the cases of *Potter* v. *Edwards* (1) and *Mainland* v. *Upjohn* (2), if and so far as they are applicable.

Rigby, in reply.

COTTON, L.J.:—

In this case Earl *Compton*, now deceased, who was the eldest son of the Plaintiff, the Marquess of *Northampton*, borrowed £10,000 from the Defendants, who are the trustees of an insurance office. When that loan was made, he did this: he gave a bond to the Defendants for payment of the principal and interest which he borrowed, and he secured payment of the premiums on the policy that was effected on his life, and bound himself to repay to the Defendants whatever they might pay in order to keep up that policy. That bond would have also served, if he survived his father, as security on his real estate which he had in *Scotland*, but as he died, that part of the security was gone. Then, contemporaneously with the bond, he executed an agreement which he afterwards amended, and the agreement as at first executed contained a recital: "Whereas the second party"—that is the Earl—"has at the date hereof received an advance from the first party"—that is the Defendants—"of £10,000 sterling, in security of which the second party has executed a bond."

Then the first party agree to effect a policy or policies of insurance on the life of the second party as against that of his father, to the extent of £34,500, that is to say, if he died in the lifetime of his father, the sum secured by the policy would have to be paid. The money payable under that policy is the amount now in contest between the parties. The premiums for the first five years, and the interest, were to be allowed to accumulate for five years; then after that, the Defendants were "to be entitled to use all diligence against the person or estate of the Earl for payment of the interest or premiums paid by them after the expiration of the period of the said five years." That does not mean if they suspended their claims for premiums or interest in any way to prevent them suing afterwards; it was in no way a

(1) 26 L. J. (Ch.) 468. (2) 41 Ch. D. 126.

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release of the covenant to pay, but only that it might accumulate for a time. Then the fourth clause is material: "In the event of the second party not having paid to the first party the whole sums due by him to them before the death of the said most noble marquess, his father, then the policy or policies of assurance effected by the first party as aforesaid shall belong absolutely to the first party, and neither the second party nor his representatives shall have any claim or right thereunder." That is a curious provision, because if his father died in his lifetime, then there would be no force at all in the policy, because it was to be paid if the son died in the lifetime of his father. Then there is the fifth clause: "In the event of the second party paying the first party before the death of the most noble marquess his father, the whole sums due to them, the first party shall be bound forthwith to assign the said policy or policies of assurance to the second party, but that always at his own expense." There, as far as that goes, I think it is pretty clear. The sixth clause introduces a difficulty, but there was a subsidiary agreement which we may take as entirely substituted for the former one. That agreement recites the sixth clause of the first agreement. [His Lordship read the recital, and continued:—]

That is a mere recital of the agreement as it originally stood in the last clause, and then it goes on in this way: "And whereas the said last mentioned clause does not accurately state the terms upon which the said advance of £10,000 was agreed to be made, it having been agreed that the policy or policies to be effected upon the life of the said Earl *Compton* against that of his father the Marquess of *Northampton*, and in the event of his death before his father without having repaid all the principal moneys, interest and costs due" to the Defendants, "that the said policy or policies and the sums thereby assured should belong absolutely to" the Defendants. "Now, these presents witness that in consideration of the said advance being made to the said Earl *Compton*, it is hereby agreed and declared by and between the said parties hereto that in the event of the said Earl *Compton* predeceasing his father, the Marquess of *Northampton*, without having paid all principal moneys, interest and costs due to the" Defendants, "under or by virtue of the bond in the said recited

agreement mentioned, that then and in such case the policy or policies, and all moneys thereby secured, shall belong absolutely to" the Defendants, "or the survivors or survivor of them, or the executors or administrators of such survivor or their or his assigns. And it is further agreed that, in consideration of the premises, the said Earl *Compton* shall, whenever called upon so to do, execute any further or other assurance for the purpose of carrying out at his own expense this agreement." Those were the instruments between the parties, and what do they mean, having regard to the last clause in the subsequent agreement? It is not the case of a policy being effected on the one hand by the lender simply for his own security, but it is a policy effected under a contract with the borrower, the borrower contracting that he will pay the premiums, or, if he does not, he shall be liable to be sued for them. Although this policy was effected in the insurance office of which the Defendants were trustees, we must consider it just as if it was a policy effected by them in another office. They might do it just as they pleased either in their own or in any other office. Quite independently of this last agreement, and without reference to the clause which there is in the first agreement bearing on the same point, what would have been the rights? The Earl, or rather his representatives, would have been entitled when the money was paid to say: "Account to me for that and pay over to me any balance which there may be beyond the sum which I borrowed from you." That is laid down clearly in *Drysdale* v. *Piggott* (1). Of course there are cases where there is no contract between the parties, and where the person lending the money, as I say, chooses himself to insure the borrower's life. There he does that simply for his own benefit, and he can whenever he likes drop the policy, and he can take it up when he likes; but he does it simply as his own property and for his own benefit. But here it is different. Unless effect is given to that last agreement between the parties (and, of course, there is no question as to what is the effect of it), then the Earl's representatives would have been entitled, as I say, to get the balance of the money, which was £34,500, much more than enough to pay the money

(1) 8 D. M. & G. 546.

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lent and the premiums paid on the policy; and he would be entitled to call on the Defendants to account for it. But, it is said, it is altered by that last clause. Now, I need not quote authorities to shew that Courts of Equity never will allow the equity of redemption to be cut off except by force of time or by the order of the Court. The mortgagor must be foreclosed if he does not redeem; Lord *Hardwicke* says that as plainly as possible, and it has always been the rule established in Courts of Equity. "This Court," says Lord *Hardwicke* in *Toomes* v. *Conset* (1), "will not suffer, in a deed of mortgage, any agreement in it to prevail, that the estate become an absolute purchase in the mortgagee upon any event whatsoever." He gives some reasons for that which may or may not now be the only reasons, but that is the principle of the Courts of Equity. How is this case said to be distinguished from that? It is said this is not like a mortgage of property of the borrower; it is not the property of the Earl, and it is not like preventing him from redeeming that which was his own. But is that so? As I pointed out, but for this last clause he would be entitled to have an interest in the policy. He had such an interest in it that although the legal estate was, as is always the case, not only in mortgages of a policy but in other mortgages, in those who lent the money, yet he could call on those who had got the money to account and pay over to him any residue.

There was here a point raised by Mr. *Rigby* which I ought to deal with. What he said was that this memorandum (which I have last read) does not contain the whole of the 6th clause of the original agreement, and that what we ought to consider is this, that the only thing that is changed here is that the policy moneys, or the balance of the policy moneys, shall belong to the insurance office and not to Earl *Compton's* representatives. But I cannot believe that, for if so we are in this difficulty, that the Defendants, the trustees, can exercise their powers under the bond because the agreement is to be without prejudice at all to the securities which they already have. So that they can get the whole money, and at the same time exercise their right under the bond if any part of this sum of £10,000, or any part of

(1) 3 Atk. 261.

the premiums, are not paid. That, of course, rather shocked the mind, and it was said: "Oh! no, they never would sue at all"; and it is contended that the Earl could get back the policy and pay off the money at any time during the lifetime of his father, and so put an end to the whole matter. But the question is, what are the rights of the parties purported to be given by this deed? As I understand it, this fresh memorandum really contains the whole of the agreement between the parties as regards the policy moneys and in the events which have happened. Although it is very true that in the original agreement there was an express proviso, which I have read, that the balance of the policy moneys shall belong to the Earl, and that he should be liable to be sued in the event of the policy moneys not being sufficient, yet there is nothing to confine the right to sue in the events which have not happened—namely, the policy moneys being insufficient. As it is, there are policy moneys amply sufficient to pay all this; but the office says—and that must be their contention—that they are not bound in any way to account for this to the Earl or his representatives; and more, as the memorandum of agreement expressly says it is to be without prejudice to their rights under the bond, they can (that must be the consequence although they do not say so) sue the Earl. They have lost the security of the real estate, but then this still remains a bond good against his means and effects and against anything which his representatives may have from him. The principle of the law is not to allow any contract between mortgagor and mortgagee though binding at law, to prevent the mortgagor from exercising his right of redemption. When a mortgage is executed, at law, the property conveyed becomes the absolute property of the mortgagee, unless the mortgagor on the day fixed for redemption pays or tenders the money advanced and interest. But Equity says, this is meant to be, and ought to be treated, only as security for the money advanced and interest; and though the estate is absolute at law, if the borrower tenders the money, interest, and costs, the mortgagee must reconvey to him the estate, which at law is absolutely the mortgagee's. Although it is true this policy is not a property which formerly belonged to the mortgagor, yet by the effect of the contract and

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the way in which the premiums were provided for, it did belong to the estate of the Earl, and in my opinion a Court of Equity ought to look to this as intended as security only for the money, and ought not to allow any stipulations here which would enable the Defendants, to take this without liability to pay the balance of the money which has been insured by the Earl. Therefore, in my opinion, this clause cannot be allowed to stand and cannot interfere with what would otherwise be the rights of the parties.

It is very true that there are cases, as I pointed out, where the policy is effected by the mortgagee, and there it belongs to him. But here from the way in which this was created, in my opinion, the mortgagor had just as much interest in it as if it had been a policy originally belonging to him; by the terms of its creation the Earl had an interest in it, that is to say he had a right to get the surplus of it after paying all the moneys which he had borrowed. It is true that some cases were quoted by Mr. *Rigby*—one case in particular *Potter* v. *Edwards* (1)—where there was an agreement that although a smaller sum was advanced, the mortgage should be only redeemable on payment of £1000. But in that case the Court treated it still as a security and the question whether £1000 was a reasonable sum to be paid when only £700 was advanced was a mere question as to whether there had or had not been a hard and unfair bargain on the borrower, but when that was not established against the mortgagee, then the right to redeem still remained, though it was redeeming not on payment of the sum advanced, but of the sum which the parties agreed, and it had been held fairly agreed, it was worth the mortgagors' while to pay in order to get a smaller advance when he was in want of money.

In my opinion this case comes within the principle which in equity regulates mortgages, and that we ought to hold that the Marquess is right and is entitled to have an account of this policy money, and to have the balance after paying the principal, interest, and any premiums which the office may have paid in order to keep this policy up.

In my opinion the appeal fails.

(1) 26 L. J. (Ch.) 468.

LINDLEY, L.J.:—

The rights of the parties in this case turn on three documents which, as they stand, are not easily understood. They must be construed together. The Scotch bond binds the borrower to repay the loan and interest, and the premiums on a policy payable in the event of his dying before his father, and if the borrower survives his father and so becomes entitled to the property mentioned in the bond, that property is charged with the repayment of the loan, and the interest and the premiums.

The second document contains six clauses; but the sixth is replaced by the third document. The effect of the second and third documents is to render it obligatory on the lenders to effect a policy payable in the event above mentioned, and to keep it up for five years and not to require payment either of interest on the loan or of the premiums during that time. After that time the lenders were under no obligation to pay the premiums or to forbear payment of interest. Pausing here for a moment, it is plain that if there were nothing more in the documents the policy would belong to the borrower, subject to the payment of all moneys due to the lenders. But the documents do not stop here. Clause 4 of the second agreement says that unless the borrower pays off the lenders in the lifetime of his father the policy is to be the lenders', and they are, at the same time, to be "entitled to exercise their full powers and privileges under the bond"—*i.e.*, to enforce all the borrower's obligations under that instrument. This fourth clause, in terms, applies whether the borrower predeceases his father or not; but, in fact, it can have no operation unless he dies before his father, for in no other event can the policy money become payable to any one. So that, unless the lenders are paid off before the father dies, the policy money (if payable at all) will belong to the lenders, and yet the assets of the borrower will be liable under the bond to repay the principal and interest and all the premiums on the policy. The third document only makes this more plain in the event of the borrower dying before his father without having paid off the lenders, which is the event provided for in it. Whether the third document is read as in substitution for the whole of the sixth clause of the second document, or whether it

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is read as replacing only part of this sixth clause, the fourth clause of the second document is untouched, and the effect is what I have stated. The fifth clause of the second agreement provides that if the borrower pays off the lenders in the lifetime of his father he is to have the policy.

The borrower died before his father without having paid the lenders anything. The policy has fallen in, and the question is whether the lenders can keep the policy money, or whether they must account to the legal personal representatives of the borrower for the excess of the policy moneys over the amount due to the lenders on the bond. The lenders disclaim all right to keep the policy money, and also to obtain payment of the principal, interest, and premiums under the bond. They also suggest that the borrower would have had some right to get back any premiums he might have paid. But I cannot adopt this suggestion. I am of opinion that the true effect of these documents is either to entitle the lenders to keep the policy moneys and also recover the principal, interest, and premiums, or to entitle them to no more than to recover their principal, and interest, and premiums. I cannot adopt the construction which entitles the borrower to the policy only if he pays the lenders off in the lifetime of his father, and deprives him of all interest in it if he fails to do this, and yet leaves him liable to be sued on the bond. Neither can I see that in the events which have happened the borrower is discharged from liability although he has lost all right to the policy money. The fourth clause of the second agreement is, in my opinion, opposed to this view.

I can come to no other conclusion than that the transaction was a loan on security. The lenders were to have, as a security, either the lands or the policy as the case might be. The right to redeem the land if the borrower had ever become entitled to it would have been plain enough. The right to redeem the policy before it became payable is conferred by the fifth clause of the second agreement, and the attempt to confine that right in point of time is, I think, opposed in principle to a long series of authorities which I am not at liberty to question. I agree with Lord Justice *Cotton*, and for the reasons given by him and those above stated I am of opinion that this appeal must be dismissed with costs.

BOWEN, L.J.:—

With respect to what was to become of this policy in the event which has happened, the intention of the parties and the meaning of the bargain which they made are admittedly clear. A supplemental memorandum, executed for the especial purpose, provided in the plainest language that on the contingency which has occurred this policy and all moneys secured by it were to belong absolutely to the Defendants. The question is, whether this distinct and deliberate compact is to be set aside as repugnant to any rule of equity.

The principle invoked by the Plaintiff is summed up in the epigrammatic formula "once a mortgage always a mortgage." Whenever a transaction is in reality one of mortgage, equity regards the mortgaged property as security only for money, and will permit of no attempt to clog, fetter, or impede the borrower's right to redeem and to rescue what was, and still remains in equity his own. The Plaintiff contends that the bargain made as to the policy is at variance with this wholesome doctrine, and it is on this ground that Mr. Justice *North* has adjudged to the representative of the borrower what must be admitted to be a considerable windfall. The Defendants, on the other hand, maintain that so far as affects this policy there never was a mortgage, or anything that can be termed a mortgage transaction; that the policy never was Lord *Compton's*, that the term "redemption" is inappropriate as applied to it, and that the term "security" is one which begs the question at issue. All, the Defendants say, that was provided, was, that the borrower was to be at liberty at any time before his death to purchase the policy and to make it his own. He has not, they say, done so, and a contingency, therefore, has occurred upon which the policy was always intended to belong to the lenders. Is it true, as suggested by the Plaintiff, that the transaction between the Plaintiff and the Defendants was merely one of mortgage, of which the arrangement as to the policy was only an incident? An accurate analysis will, I think, shew that the stipulations as to the policy cannot properly be so described. In the event which has happened—namely, the death of Lord *Compton* in the lifetime of his father—there has been, so far as regards the

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Scotch estates, no mortgage which can take effect at all, or which can require the benevolent intervention and protection of this Court. No doubt, in the event which has not happened, supposing, that is to say, that Lord *Compton* had survived his father, there would have been an effectual mortgage of the Scotch estates. But Lord *Compton* did not profess to, and could not, mortgage those estates, in case of his own death, against the heirs of entail. In the contingency, therefore, which has occurred, the mortgage of them had no effect at all, and was never intended to have any. For the security of the office of the Defendants against the mischance which has, in fact, occurred—the failure, that is to say, of all mortgage on the Scotch estates—the policy now in question was called into existence—in what manner and on what terms has to be considered. Instead, therefore, of regarding the transaction as from first to last one of mortgage, I think it would be safer, up to this point in the discussion, to describe it as one of loan—a loan to be secured in the event which has not happened by an effectual mortgage, but to be protected in the event which has happened by an arrangement as to a policy to cover the failure of the Scotch mortgage transaction. The nature of the contract for this policy has to be decided in this appeal, but we do not really get nearer to a correct appreciation of its character by treating its provisions as if they could be affected by, or could possibly affect, a defunct equity of redemption in a mortgage of estates which has come to nothing.

This brings us to what seems to be the true and crucial question. Was this policy ever Lord *Compton's* to mortgage? Had he ever an equity of redemption in it? If the answer is in the negative, what mortgage transaction or what equity of redemption is this Court asked to protect? The mortgage of the Scotch estates, which is extinct? or an equity of redemption in the policy which Lord *Compton* never had? In the view taken by Mr. Justice *North* and by my learned brethren in this Court, that the matter must be dealt with precisely as if there had been an actual policy effected with, and actual premiums paid to, some other office than the Defendants' own, I entirely concur. Nor am I influenced by the consideration that if the Plaintiff succeeds

Lord *Compton's* estate will have received from the Defendants a large sum of money without paying anything at all—except, perhaps, so far as the possibility of such a result may throw light on the discussion whether the policy and its produce were meant to be the property of Lord *Compton* at all events and in all circumstances. The first and most important matter to be weighed is, no doubt, the fact that the premiums, though advanced by the Defendants' office, were to be charged in account against the borrower. If this stood alone a presumption would arise, based on reasonableness and justified by authority, that the policy on coming into existence was to be the borrower's in any event, though mortgaged to the Defendants for the advance. But such a presumption is a mere inference of fact to supply the place of better information. It cannot displace express convention between the parties. In the clear light of a distinct agreement upon the point the presumption pales its ineffectual fire and disappears. Lord *Compton's* right to the policy is not a matter of presumption. It arises under a written contract which is explicit on the point, and it is to this written contract that we must turn if we wish to discover the law of the being of this policy in the event which has occurred.

So far as the policy is concerned I cannot see that this is a case of a borrower mortgaging his own property, and then consenting to fetter his own right to redeem. It seems to me rather the case of a loan protected in a particular event, not by a mortgage, but by a wagering and speculative bargain to take the place of and to act upon the defeasance of a mortgage. The policy was not an ordinary policy of insurance against a death, but a wager of one life against another. The premiums were to be charged against Lord *Compton* as a special term of the bargain, but without any reference to the question to whom the policy was ultimately to belong. That was to depend on a contingency. Lord *Compton* was to have a right on payment of his debt to buy it, and so far only it was to be a security for his debt. But in no other sense was it a security, and the use of this term, except as so defined and limited, is fallacious. The clauses which gave Lord *Compton* a right to acquire it are not provisos for redemption, but only provisos for purchase, and the use of the term

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"redemption" again becomes misleading. Pecuniary adventures regulated by an express provision such as is contained in the final deed of the 14th of June are not in substance mortgages any more than they are mortgages in form, nor are they within the mischief struck at by the equitable rule. The term which it is sought to reject as inequitable is of the gist of the arrangement, and must have affected the calculations of the Defendants' office. Totally different considerations arise when it is a question of depriving a man of what is his own, and of refusing to countenance a formal surrender of his right to rescue his own property even at the eleventh hour from the jaws of a money-lender. Here it is a question rather of withholding from a borrower the benefit of a windfall, for which he has never bargained. There is no authority for extending the equitable doctrine invoked by the Plaintiff to such an arrangement, and such an arrangement would not give rise to the evils which the equitable doctrine is designed to prevent.

The Plaintiff's counsel urged upon us the apparent hardship which might, on the Defendants' construction, arise, if Lord *Compton's* estate were to be held liable to be deprived of the property in the policy, simply because Lord *Compton* might have left unpaid some small fraction of the debt or costs. No doubt there would be such a hardship if the policy had been Lord *Compton's*, or if his estate were to lose it by his non-payment of a trifling bill of costs. But it would be an ocular illusion still to regard such a result as a hardship, after it has been once ascertained that the policy never was his, and was only to become his if he had exercised an option, which in truth he never did exercise.

To prove that the contract as to the policy was in substance one of mortgage, the Plaintiff's counsel further relied upon the proposition that the final deed contained no provision for any release of the personal obligation of the debtor on his bond, or for the extinction of the debt, even in the case of the handing over of the policy to the Defendants. But I do not so read the provisions of the final deed. The substituted agreement as to the policy only displaced, I think, so much of the clauses of the previous deed, and in particular, of clause 6, as was inconsistent with it. The language of clause 4 in this preceding deed

would, if it stood alone, be ambiguous, but clause 4 (the clumsy draftsmanship of which is apparent on other grounds) must be read by the light of clause 6. Taking both together, I think they provide sufficiently for the extinguishment of the debt; and this result is left undisplaced by the new agreement, which is intended, I think, only to dispose of surplus. The more reasonable view seems to me to be that to the extent of the produce of the policy the debt was to be extinguished, and in case the question were to arise I think the Court would so hold.

In conclusion, I have found no case that is in point. The present problem is not governed by authority. My view is that, as regards this policy, the transaction was not one of mortgage, but of a wagering and speculative bargain to replace a mortgage which in the event which has happened would have been defunct, a bargain in which it was clearly intended and expressly agreed that the policy in the contingency which has occurred never was to become Lord *Compton's*. The rule of equity applied by Mr. Justice *North* does not, therefore, in my opinion, become appropriate. My brothers, however, think differently, and as their knowledge and experience are better than mine, I see no reason to be dissatisfied that I am in a minority, and that their view prevails.

Solicitor for Plaintiff: *H. T. Boodle.*
Solicitors for Defendants: *Wilde, Berger, & Moore.*

M. W.

KAY, J.
1890
June 21.

Ex parte SCOTTISH ECONOMIC LIFE ASSURANCE SOCIETY.

Life Assurance Company—Deposit—Amalgamation—Repayment of Deposit—Life Assurance Companies Act, 1870 (33 & 34 *Vict. c.* 61), *s.* 3 [*Revised Ed. Statutes, vol. xvi., p.* 359]—*Life Assurance Companies Act*, 1872 (35 & 36 *Vict. c.* 41), *s.* 7 [*Revised Ed. Statutes, vol. xvi., p.* 961].

The *E. Life Assurance Society* made the deposit of £20,000 required by the *Life Assurance Companies Act*, 1870, s. 3, but did not accumulate a life assurance fund out of premiums as mentioned in the section. The *E. Society* effected an amalgamation with the *M. Life Assurance Company*, which had accumulated out of premiums previously received a fund exceeding £100,000. There were no creditors of the *E. Society* other than the policy-holders, nearly all of whom had agreed to accept the liability of the *M. Company*. Upon a petition by the *E. Society* and *M. Company* for payment of the deposit to the *M. Company* :—

Held, that as there had not been an accumulation of a life assurance fund out of the premiums received by the *E. Society*, the provisions of the section had not been complied with, and the order could not be made.

The Court allowed the petition to stand over generally, intimating that it might be brought on again, when the *M. Company* had accumulated out of the premiums to be received on all or any of their policies an additional life assurance fund amounting to £40,000.

Petition.

The *Scottish Economic Life Assurance Society* were a limited company, having a nominal capital of £500,000, divided into 166,666 shares of £3 each, and one share of £2. Only 25,000 £3 shares were issued, £1 being paid up on each share.

On the 7th of August, 1885, the *Economic Society*, in pursuance of the *Life Assurance Companies Acts*, 1870 and 1872, paid the sum of £20,000 into Court. This sum was subsequently invested in *India* stock.

On the 12th of February, 1889, an agreement for amalgamation was entered into between the *Economic Society* and the *Scottish Metropolitan Life Assurance Company*. By the terms of the agreement the *Economic Society* were to transfer to the *Metropolitan Company* all the assets, funds, business, goodwill, and property of the *Economic Society*. The *Metropolitan Company* were to take over all the liabilities of the *Economic Society*, and

the shareholders thereof were not to be liable otherwise than to pay to that company the full amount of their shares. The *Metropolitan Company* undertook, so soon as practicable after realizing the assets of the *Economic Society*, including payment of the deposit, to pay £25,000, with interest at 4 per cent. till paid, to that company for division among their shareholders. A memorandum or endorsement was to be put on each current policy of the *Economic Society* containing an obligation or acknowledgment of liability of the *Metropolitan Company* therefor, and a declaration that such policy should be entitled to the whole rights, privileges, and advantages, including bonuses, but subject to the conditions and declarations, of a policy of the same class and nature issued by the *Metropolitan Company* of the date such current policy bore, in all respects as if the same had originally been issued by the *Metropolitan Company*; but any policy-holder who neglected or declined to accept such endorsement or obligation, on or before the 15th of May, 1890, was not to be entitled to participate in the profits of the *Metropolitan Company*. It was also agreed that the *Economic Society* should be wound up under voluntary liquidation.

On the 22nd of February, 1889, resolutions were duly passed for the voluntary winding-up of the *Economic Society*, and *W. G. Bloxsom* and *W. R. Macdonald* were appointed liquidators. On the 14th of March, 1889, the provisional agreement was sanctioned by the Court.

The liabilities of the *Economic Society* under subsisting life policies were the only debts and liabilities remaining outstanding.

The *Economic Society* had issued 829 life policies for sums amounting to £282,167, of which sixty-nine, assuring £21,743, had lapsed. The holders of 756 of the policies, assuring £259,274, had accepted an endorsement on the policies in accordance with the agreement of the 12th of February, 1889. The remaining four policies, assuring £1150, were outstanding. The holders of three of these, assuring £650, who were resident abroad, had been applied to for their assent to the transfer, but no replies had been received from them. The holder of the fourth policy, assuring £500, had become bankrupt, and as the policy had no surrender value, the official receiver declined to take it up.

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The *Metropolitan Company* was established in 1876, and had duly paid into Court the deposit of £20,000 required by the *Life Assurance Companies Act*, 1870, and this sum was paid out to the company in 1885, it being shewn that the company's life assurance fund accumulated out of the premiums paid to them exceeded £40,000. This fund, at the date of the presentation of the petition, exceeded £100,000.

It did not appear that there had been any accumulation of a life assurance fund out of premiums received by the *Economic Society*.

This petition was presented by the *Metropolitan Company* and the *Economic Society*, and the liquidators of that society, asking that the fund in Court, representing the deposit of £20,000 paid by the *Economic Society*, should be transferred and paid to the *Metropolitan Company* (1).

Renshaw, Q.C., and *Methold*, for the Petitioners:—

The *Metropolitan Company* have accumulated a fund far larger than is required by sect. 3 of the *Life Assurance Companies Act*, 1870, and the deposit may, therefore, be ordered to be paid to them. In *In re Colonial Mutual Life Assurance Society* (2), a fund

(1) By the *Life Assurance Companies Act*, 1870 (33 & 34 Vict. c. 61), s. 3: "Every company established after the passing of this Act within the United Kingdom . . . shall be required to deposit the sum of twenty thousand pounds with the Accountant-General of the Court of Chancery, to be invested by him in one of the securities usually accepted by the Court for the investment of funds placed from time to time under its administration, . . . and the Accountant-General shall return such deposit to the company so soon as its life assurance fund accumulated out of the premiums shall have amounted to forty thousand pounds."

By the *Life Assurance Companies Act*, 1872 (35 & 36 Vict. c. 41), s. 7: "Where a company . . . has transferred its business to or been amalgamated with another company, no policy-holder in the first-mentioned company who shall pay to the other company the premiums accruing due in respect of his policy shall by reason of any such payment made after the passing of this Act, or by reason of any other act done after the passing of this Act, be deemed to have abandoned any claim which he would have had against the first-mentioned company on due payment of premiums to such company, or to have accepted in lieu thereof the liability of the other company, unless such abandonment and acceptance have been signified by some writing signed by him or by his agent lawfully authorized."

(2) 21 Ch. D. 837.

received from policy-holders abroad was treated as being liable to answer policies within the *United Kingdom*.

[KAY, J.:—In that case the policies were all issued by the same company. The words of the section are, "accumulated out of the premiums," which must mean that the accumulation is to be made out of the premiums received by the company which has paid the deposit into Court, and in this case there has been no such accumulation.]

The object of the Act in requiring the deposit, is the protection of creditors. That is amply secured in this case. All the outside debts have been paid, and the policy-holders, with insignificant exceptions, have, by the indorsements on their policies, agreed to accept the liability of the *Metropolitan Company* in lieu of that of the *Economic Society*.

[KAY, J., referred to sect. 7 of the *Life Assurance Companies Act*, 1872, and observed that there had been no abandonment of claim against the *Economic* in writing signed by the policy-holders as mentioned in that section.]

They have accepted the liability of the *Metropolitan Company* as fully as if their policies had been originally issued by that company. There will, however, be no difficulty in accumulating a further sum of £40,000 out of the future premiums received by the *Metropolitan Company*; and if the Court considers such an accumulation necessary, we ask that the petition may stand over generally.

KAY, J.:—

The facts are all before me now, and I will, therefore, express my opinion upon the matter. It seems there was a company called the *Scottish Economic Life Assurance Society*, formed for the purpose of life assurance business. They made the deposit of £20,000, required by the *Life Assurance Companies Act*, 1870. Now, by the terms of the Act that deposit could not come out of Court until certain conditions were complied with. [His Lordship referred to sect. 3, and continued:—] The words, "accumulated out of the premiums," are essential words in that provision. I think they mean that the company formed for the purpose of

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carrying on life assurance business shall have carried on that business so prosperously as to have accumulated out of the premiums received in respect of that business the sum of £40,000. What took place in the present case was that under the powers of the Act the *Economic Society* entered into an agreement for amalgamation with another company called the *Scottish Metropolitan Life Assurance Company*. Now, the *Economic Society* are being wound up, and the amount of policies taken over is, speaking roughly, £260,000 of liability—I mean the policies for which the *Economic Society* were liable, and the liability upon which has been accepted by the *Metropolitan Company*. The *Economic Society* had not entitled themselves to receive £20,000 out of Court, because they had not accumulated, as required by the section, £40,000. The *Metropolitan* has been carrying on a very prosperous business of its own, and has accumulated not merely £40,000, but £100,000. That means, of course, that the magnitude of the company's business has been such that its directors have considered £100,000 a proper sum to set apart for the security of the policy-holders. They have induced most of the policy-holders of the *Economic* to accept the liability of the *Metropolitan Company*, but those policy-holders have not in terms abandoned their claim against the *Economic*; and sect. 7 of the Act of 1872 provides as follows. [His Lordship read the section, and continued:—] The memorandum indorsed on the policies signifies their acceptance of the liability of the *Metropolitan Company*, but it does not signify any abandonment of the liability of the *Economic*, and the petition being for payment out to the *Metropolitan* of the £20,000 deposited by the *Economic*, it seems to me there is more than one objection to it. In the first place, the accumulation made by the *Metropolitan* is not made out of the premiums on the policies of the *Economic*. No such accumulation has been made. In the second place, the *Metropolitan* seem to have thought before this amalgamation, and before they had taken over this additional liability of £260,000, that this large sum of £100,000 was a proper sum to meet the liabilities on the policies for which they were liable. They do not satisfy the letter of the Act of 1870, which is, that before the Accountant-General pays out the £20,000 there must have been an accumulation of £40,000 by

the premiums on the policies of the company, which in this case was the *Economic*. They do not satisfy the letter, and, to my mind, they do not satisfy the spirit of the Act, because there has been no accumulation in respect of or to meet these policies in the *Economic*, and it seems to me that what should be done now before this £20,000 is paid is this—there should be a further accumulation of £40,000, which may now be made out of the premiums of any or all of the policy-holders in the *Metropolitan Company*, in addition to the funds which have been already set apart to answer their own liability. I am asked to order the deposit to be paid out without having before me any of the policy-holders. I think the petition had better stand over, and, as at present advised, I think the proper course before the petition is brought on again will be for the *Metropolitan Company* to make an accumulation of £40,000, in addition to that which they have already made.

Solicitors: *Travers Smith & Braithwaite.*

C. C. M. D.

MELLERSH *v.* BROWN.

[1889 M. 3565.]

Mortgage—Interest — Arrears — Reversionary Interest in Personal Estate — Covenant to pay Principal and Interest on Specified Day, but no Covenant for Payment of subsequent Interest—3 & 4 *Will.* 4, *c.* 27, *s.* 42 [*Revised Ed. Statutes, vol. vii., p.* 396].

A mortgage of reversionary interests in personal estate contained a covenant by the mortgagor for payment of the mortgage money with interest at 5 per cent. on a specified day; but there was no provision for payment of any subsequent interest. No interest was ever paid. Fourteen years after the date of the mortgage an action was brought for foreclosure and the usual decree was made:—

Held, that redemption could only be allowed on payment of interest at 5 per cent. for the whole period of fourteen years.

ADJOURNED SUMMONS.

By an indenture dated the 24th of April, 1875, *Edward Barrett* assigned certain reversionary interests in personal estate

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(to which he was entitled under settlements prior and subsequent to the marriage of his parents) to his father, *George Barrett*, by way of mortgage for securing to *George Barrett* the sum of £600. The deed contained a proviso that if the £600, with interest at 5 per cent., was paid on the 24th of October, 1875, the assignment should be void, and there was a covenant by *E. Barrett* for payment of the £600 with interest at that rate on that day, but there was no covenant or provision for payment of subsequent interest in the event of non-payment on that day.

In June, 1875, *E. Barrett* paid to *G. Barrett* £78, reducing the mortgage debt to £522.

In February, 1878, *E. Barrett* assigned the property comprised in the mortgage to the Defendant, *G. Brown*.

G. Barrett died in 1889, and in July, 1889, the mortgage was transferred by his executor to the Plaintiff, *F. Mellersh*, in consideration of £894 10*s.* 9*d.*, paid by the Plaintiff. No interest was ever paid in respect of the mortgage debt.

Upon an originating summons taken out by the Plaintiff on the 16th of December, 1889, the usual order for foreclosure of the mortgage was made, including the usual mortgage account.

The Chief Clerk, by his certificate dated the 14th of May, 1890, found that £522 was due to the Plaintiff for principal, and £397 6*s.* for interest calculated to the 14th of November, 1890.

This summons was taken out by the Defendant asking that the certificate might be varied by disallowing part of the £397 6*s.* allowed for interest, on the ground that the Plaintiff was only entitled to six years' arrears of interest calculated from the 16th of December, 1883.

Marten, Q.C., and *Hornell*, for the Defendant, in support of the summons:—

There being no covenant in the mortgage deed for payment of interest after the 24th of October, 1875, subsequent interest can only be recoverable by way of damages, and there being no Statute of Limitations applicable to the case, the Court, acting upon the analogy of the statute 3 & 4 Will. 4, c. 27, s. 42, applicable to mortgages of real estate, will give by way of damages not more than six years' arrears of interest: *Thomson* v.

Eastwood (1). It is clear that damages will not necessarily be given at the mortgage rate: *Cook* v. *Fowler* (2); *Mounson* v. *Redshaw* (3): *In re Roberts* (4).

[KAY, J., referred to *Ashton* v. *Dalton* (5), and *Thompson* v. *Drew* (6).]

In *Thompson* v. *Drew*, there was no stipulation for interest at all. We do not dispute that six years' arrears will be allowed, but we contend that the Court has a discretion as to allowing damages, and will not award more on a mortgage of personalty, than the law permits in the case of a mortgage of realty. *Smith* v. *Hill* (7) is not an authority to the contrary, and so far as it shews that the *Statute of Limitations* applies to a mortgage of a reversionary interest in real estate, it is in our favour. The reason why more than six years' arrears were allowed in that case must have been because interest was payable by the terms of the mortgage deed. The question there was simply between the legal personal representative of the mortgagor and the mortgagee, and not as against an assignee of the equity of redemption. In *Thomson* v. *Eastwood*, the House of Lords in the exercise of their discretion, allowed only six years' arrears of interest by analogy to the statute, and that principle ought to be followed here. There has been a long delay during which the position of the assignee of the equity of redemption might have been changed.

[KAY, J.:—The fact that the mortgaged property was reversionary affords some reason for delay.]

No suggestion was made to the Defendant that the interest had not been kept down, and it would be inequitable to enforce the whole arrears against him. [They referred also to *Bolding* v. *Lane* (8); *In re Frisby* (9); *Wheeler* v. *Howell* (10); and *Hopkinson* v. *Rolt* (11).]

(1) 2 App. Cas. 215.
(2) Law Rep. 7 H. L. 27.
(3) 1 Wms. Saund. p. 201, note n., ed. 1824.
(4) 14 Ch. D. 49.
(5) 2 Coll. 565.
(6) 20 Beav. 49.
(7) 9 Ch. D. 143.
(8) 1 D. J. & S. 122.
(9) 43 Ch. D. 106.
(10) 3 K. & J. 198.
(11) 9 H. L. C. 514.

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Renshaw, Q.C., and *Manby*, for the Plaintiff:—

It is admitted that no Statute of Limitations is applicable to the case; but the Court is asked to apply to personal estate a supposed analogy drawn from the law applicable to real estate. There is no reason why the Court should do anything of the kind. Consistently with *Cook* v. *Fowler* (1), and *In re Roberts* (2), it is clear that if the Plaintiff had brought an action for the debt, he would have been entitled to recover as damages the whole amount of the interest. He had twenty years within which to bring his action, and when he brought it the jury would have been directed, as no Statute of Limitations applied, to give interest as damages at the rate specified in the mortgage deed, not exceeding the usual mercantile rate of 5 per cent., *i.e.*, in the present case at 5 per cent.—the rate allowed by the Chief Clerk. The Plaintiff might, in fact, upon the principle of *Cook* v. *Fowler*, have received more than has been allowed, viz., interest on the first year's interest. There is absolutely no authority in support of the Defendant's contention. *Smith* v. *Hill* (3) is distinctly against him. *Thomson* v. *Eastwood* (4) was an entirely different case, and went upon the equitable doctrine of laches. There has been no laches in this case, and the Plaintiff when he took his transfer paid for it upon the footing that there was interest due under the mortgage.

[*In re Kerr's Policy* (5) was also referred to.]

Marten, in reply.

KAY, J:—

This is a very simple point. A great many years ago a reversionary interest in personal property, which is still reversionary, was mortgaged, and there was a covenant for payment of principal on a particular day with interest at 5 per cent. down to that day. Now, beyond all question, in an action on the covenant a jury would be directed to give damages for non-payment after the day which was fixed for payment, and those damages would

(1) Law Rep. 7 H. L. 27.
(2) 14 Ch. D. 49.
(3) 9 Ch. D. 143.
(4) 2 App. Cas. 215.
(5) Law Rep. 8 Eq. 331.

be measured by the rate of interest, if it was not more than 5 per cent., and if it was more than 5 per cent. then they would be calculated at the rate of 5 per cent. In this case there has been judgment for foreclosure, and the account has been taken by the Chief Clerk of what is due on the mortgage to the mortgagee, that is, of the amount upon payment of which the mortgagor is to be allowed to redeem. It is objected that the Chief Clerk has allowed interest—no interest having ever been paid—from the date of the security, and it is said that he is wrong. Now, why is he wrong? Not because there is any Statute of Limitations which applies to the case, but because it is said that the Court ought to act upon the analogy of the statute, 3 & 4 Will. 4, c. 27, s. 42, which enacts that in the case of a charge on land no interest shall be recovered but within six years next after the same shall have become due. But if the Legislature has enacted that there shall be that limit with regard to real estate, and has not so enacted with regard to personal estate, on what ground am I to follow that analogy? It is not an analogy between the arrears of interest recoverable on a legal debt and those recoverable on an equitable debt. No doubt equity, in the case of an equitable debt, follows the simple analogy afforded to it by the law applicable to a legal debt; but I never heard that a court of equity is under any obligation to follow, as regards personal estate, the analogy of a statute which applies to real estate. That is not an analogy within the application of the rule that equity follows the law; but the reasoning is, that whereas the Legislature has enacted that in the case of a charge on real estate only six years' arrears of interest shall be recoverable against the estate, and whereas it has not enacted anything of the kind with regard to personal estate: therefore—what? I should have thought the result was inevitable, that as to personal estate the rule is not to be observed, and the idea of there being any analogy is one which I do not understand. Now, in this case what the mortgagor is really asking is this; he comes here practically saying: "I admit I never did pay any interest on this debt; I admit that the debt is due and that interest is due in respect of it; I admit that there is a judgment for foreclosure against me; but I say that I ought to be allowed to redeem, not on paying the interest due from me

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which I have not paid, but on payment of only six years' arrears of interest." For what reason? Why is this Court to allow him to redeem without paying that which is really due from him, and which he has not paid? No authority in support of that proposition has been produced, and, so far as authority goes, it is directly the other way. *Smith* v. *Hill* (1) is distinct upon the point. There much more than six years' arrears of interest were allowed in respect of a security on personal estate; and in another case of *In re Roberts* (2), where the claim was not for realization of the mortgage but for breach of the covenant to pay the mortgage debt, and the question was what rate of interest should be allowed, and the rate allowed was not so much as the rate fixed by the mortgage deed, the Lord Justice *Cotton* said (3): "It is only necessary for me to add that we are not deciding now what rate of interest should be allowed in a suit for redemption, but simply on an action brought for breach of covenant to pay the money on a given day," an intimation which, if I understand it, means this: "If the mortgagor were coming here asking for redemption it is very possible we might say to him that he should not redeem without paying the higher rate; but as it is only a question on the covenant, which does not expressly reserve interest after the day named for payment, we will fix as damages a rate of interest lower than that for which the mortgage deed itself stipulates." In this case there is absolutely no authority for the limitation of the amount of interest which the mortgagor is asking for, and so far as any authority exists it is exactly the other way. The mortgagor, in fact, wants to have the indulgence of redeeming the property without paying the whole of the interest, or the whole of the damages in lieu of interest, if he prefers so to phrase it, which ought to be paid. I see no reason why I should grant him that indulgence, and therefore, it seems to me, that this summons to vary the Chief Clerk's certificate must be refused with costs.

Solicitors: *George E. Philbrick; John Patrick Murrough*, agent for *R. E. & T. B. Mellersh, Godalming.*

(1) 9 Ch. D. 143. (2) 14 Ch. D. 49.
(3) 14 Ch. D. 52.

SHEPHERD *v.* HIRSCH, PRITCHARD & CO.

CHITTY, J.

1890

July 11, 12, 17, 22.

[1890 S. 1486.]

Practice—Service of Writ—Defendants sued in Name of Partnership Firm—Foreign Partner—Service on Manager—Rules of Supreme Court, 1883, *Order* IX., *r.* 6; *Order* XVI., *r.* 14.

A writ was issued against a partnership firm of *H., P. & Co.*, and was served in *London* under Order IX., rule 6, on the manager, at the place where the business of *H. P. & Co.* purported to be carried on.

H. was a foreigner domiciled in *France*, and *P.* a British subject resident here.

H. moved to discharge the service of the writ on the ground that the partnership of *H. P. & Co.* had been dissolved to the knowledge of the Plaintiff some time before the issue of the writ, and moreover that he (*H.*) was a foreigner domiciled in *France*.

Upon the evidence, the Court arrived at the conclusion that the dissolution of the partnership had not come to the knowledge of the Plaintiff prior to the commencement of the action :—

Held, that under Order IX., rule 6, coupled with Order XVI., rule 14, service on the manager at the place of business was good service on *H. & P.* notwithstanding the fact of *H.* being a foreigner domiciled abroad.

Service on one partner within the jurisdiction is good service on all the partners, although the partnership is a foreign partnership and all the partners reside and are domiciled out of the jurisdiction.

Pollexfen v. *Sibson* (1) discussed and followed.

MOTION.

The writ in this action had been issued against the partnership firm of *Hirsch, Pritchard & Co.*, claiming an account of all money transactions between the Plaintiff and *Hirsch, Pritchard & Co.*, as his agent.

The writ had been served under Order IX., rule 6, in *London*, at the place where the business of *Hirsch, Pritchard & Co.* was carried on, upon their manager.

The firm of *Hirsch, Pritchard & Co.* consisted of two partners only; *Hirsch* being a naturalized Frenchman, resident and domiciled in *France*, and *Pritchard* a British subject resident in *England*.

This was a motion by *Hirsch* to set aside the service of the

(1) 16 Q. B. D. 792.

CHITTY, J. 1890 SHEPHERD v. HIRSCH, PRITCHARD & CO.

writ, on the ground that he was a foreigner residing out of the jurisdiction of the Court, and moreover, that before the commencement of the action the firm of *Hirsch, Pritchard & Co.* had been dissolved to the knowledge of the Plaintiff.

Levett, for the motion:—

Hirsch was, when the action was commenced, the sole member of the firm of *Hirsch, Pritchard & Co.*, and service on the manager, under Order IX., rule 6, at the place of business was consequently bad, he being a foreigner out of the jurisdiction: *Russell* v. *Cambefort* (1).

The proviso at the foot of Order XVI., rule 14, even if it makes the rule applicable where the Plaintiff is ignorant of the dissolution, cannot extend the rule so as to reach a foreigner out of the jurisdiction.

I submit that that rule, moreover, only applies to the case of a continuing partnership—that is to say, where the partnership originally consisted of three or more members and one goes out; it cannot apply to a non-existing partnership.

The Plaintiff ought to have applied, under Order XI., for leave to serve *Hirsch* out of the jurisdiction.

Romer, Q.C., and *Theodore Ribton*, for the Plaintiff:—

The proviso at the foot of Order XVI., rule 14, was added with the express object of getting rid of the doubts expressed in *Ex parte Young* (2), as to whether the rule as it then stood applied not only to a partnership existing at the time when the writ was issued, but also to a partnership dissolved before the issue of the writ. It must be inferred from the proviso, that if a partnership is dissolved without the knowledge of the Plaintiff, as it is proved in this case to have been, then the service on the partnership is good. The contention that this rule is only applicable to partnerships consisting of three or more persons is negatived by the rule itself, which commences with the words "any two or more persons."

We submit that this case falls within the decision in *Pollexfen*

(1) 23 Q. B. D. 526. (2) 19 Ch. D. 124.

v. *Sibson* (1), which was commented on by the Court of Appeal in *Russell* v. *Cambefort* (2), and not overruled, and that the service at the place of business of the firm on the manager was good service, both on *Hirsch*, though resident out of the jurisdiction, and on *Pritchard*.

Levett, in reply.

CHITTY, J. (after stating the facts of the case, continued):—

Hirsch's case is simple. He says, and it is proved, that he is a foreigner naturalized by the Republic of *France*, resident and domiciled in *France*, out of the jurisdiction of this Court; and he further says and proves, that at the time of the issue and service of the writ the business was carried on by him alone without any partner under the style of *Hirsch, Pritchard & Co.*

In interpreting Order IX., rule 6, regard must be had to the ordinary principles of international law. It occurred to me during the argument that it was a question worthy of consideration, whether where a State allows a foreigner to carry on business at a fixed place within its jurisdiction it was not competent for the State to enact, consistently with such principles, that the foreigner, in return for the protection thus afforded to him by the laws of the State, should be liable, as to writs or other process issuing out its courts, to be served at such place of business by his manager or agent there in respect of contracts or obligations entered into or arising in the course of such business. But I am precluded from entertaining any such question by the decision of the Court of Appeal in *Russell* v. *Cambefort*. In that case the three members of the partnership carrying on business at a fixed place in England were all foreigners residing out of the jurisdiction; and it was held that the service on their manager in *England* under Order IX., rule 6, was bad. It follows, therefore, that where the foreigner is the sole proprietor of the business, the service is bad. If, then, these were the only facts in the case, my decision must be in favour of *Hirsch*.

[His Lordship went through the evidence with reference to the knowledge of the Plaintiff as to the dissolution of the

(1) 16 Q. B. D. 792. (2) 23 Q. B. D. 526.

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partnership.] I am bound on the evidence to come to the conclusion that the Plaintiff is right, and that he was not aware of the dissolution of the partnership when he issued the writ.

This brings me to the argument upon Order XVI., rule 14. The proviso to that rule was added by the Rule Committee after the decision of the Court of Appeal in *Ex parte Young* (1), where, on the rule as it then stood (Order XVI., rule 10, of the Rules of 1875), a doubt had been expressed by the Lord Chancellor (Lord *Selborne*) as to the interpretation of the rule, and there was a difference of opinion between the Lords Justices, one (Lord Justice *Cotton*) being of opinion that there must be a subsisting partnership at the time of action, and the other (Lord Justice *Brett*) that there need not be.

The proviso provides affirmatively for the case where the plaintiff knows when the writ is issued that the partnership has been dissolved. It does not in terms provide for the case where he does not know that it has been dissolved; but it is impossible to read the proviso without seeing that it was considered that this case was comprised within the terms of the rule apart from the proviso. It appears to me, therefore, that it would be putting a wrong construction on the rule to hold that where a plaintiff does not know of the dissolution of the partnership he cannot serve his writ on the firm which has been dissolved. But then it is said that there must be a continuing partnership to bring the case within the rule; and that if the partnership was between three or more persons, and one went out so as to make a dissolution in law, but the others continued in the partnership, the rule would apply to the partnership thus continued. "Continued" is a loose term, because if a man goes out it is a new and different partnership; it is argued that where it is a partnership between two, and two only, if there is a dissolution—that is to say, if one goes out and the other continues the business (for that is the meaning of the proposition)—then it is said the rule has no application. Now, that appears to me to be against the express language at the commencement of the rule, which commences with the words, "any two or more persons claiming or being liable as co-partners," and I am, therefore, unable to adopt the

(1) 19 Ch. D. 124.

argument, because, I think, that is not the meaning of the rule.

I have now got as far as this. If the business of *Hirsch, Pritchard & Co.* had been carried on by Englishmen, and if the partnership had been dissolved, such dissolution not coming to the knowledge of the Plaintiff before the commencement of the action, then the service of the writ on the manager at the place of business would have been good service. But then it is said for the Defendant, *Hirsch*, "Granted that the decision must be against me, if it were the case of two British subjects carrying on business here; yet the facts shew I am a foreigner domiciled in *France*, owing no allegiance to this country, and if you want to get at me you must proceed under Order XI. That is to say, you must issue your writ for service out of the jurisdiction and give me notice of it." For this proposition the case of *Russell* v. *Cambefort* (1) is again relied on, and there are certainly some observations of Lord Justice *Cotton* which do countenance that argument—at any rate, there are observations of his upon which the argument here has been founded. But there was a prior decision in the case of *Pollexfen* v. *Sibson* (2). During the argument it was assumed, and I understood it to be the fact, that in that case one member of the defendant firm had been served while he was in this country at the place of business of the firm here; but I have since learnt, from a perusal of the papers in that case, that the firm had no place of business here, and that the partner was simply served here personally while he was within the jurisdiction. Now, the Court of Appeal in *Russell* v. *Cambefort*, although they expressly overruled *O'Neil* v. *Clason* (3), did not, as I read the judgment, overrule the decision in *Pollexfen* v. *Sibson*, or treat it as interfering with their judgment; and it is my duty, therefore, to follow that decision. The effect of that decision as it stands is plain: service on one partner within the jurisdiction is good service on all the partners, although the partnership is a foreign partnership, and all the partners reside and are domiciled out of the jurisdiction.

On the facts before me, although *Pritchard*, is not a party to

(1) 23 Q. B. D. 526. (2) 16 Q. B. D. 792.
(3) 46 L. J. (Q.B.) 191.

CHITTY, J. 1890 SHEPHERD v. HIRSCH, PRITCHARD & CO.

the motion, I am bound to decide that the service effected is good service on him. Consequently the decision in *Pollexfen* v. *Sibson* (1) applies, and the service is good as against *Hirsch*, although he resides out of the jurisdiction.

No doubt Mr. *Levett* is right in saying that *Pritchard* and any other members (if there are any) of the firm sued and served here are rightly served, though not served personally, but only at the place of business, and also in saying that if I exclude *Hirsch* from that service on the ground that he is a foreigner out of the jurisdiction he can be reached by a concurrent writ issued for the purpose of allowing him to be served with notice of it out of the jurisdiction. But I am unable to see why the rules should be interpreted in so narrow a sense. The motion, therefore, is refused with costs.

July 22. Certain correspondence between *Hirsch* and the Plaintiff was this day produced to the Court, from which it appeared distinctly, that the Plaintiff when he issued the writ was aware of the dissolution of the partnership. Whereupon *Romer*, Q.C., submitted, on the part of the Plaintiff, to an order in the terms of the notice of motion, setting aside the service of the writ on *Hirsch* and giving him his costs.

Solicitors: *Lewis & Lewis; Ralph Raphael.*

(1) 16 Q. B. D. 792.

G. M.

NORTH, J.
1890
May 14, 15.

In re ALSBURY.
SUGDEN *v.* ALSBURY.

[1890 A. 194.]

Company—Reserve Fund—Dividend—Bonus—Capital and Income—Tenant for Life.

The memorandum and articles of association of a company provided for increase of capital. The articles provided that the directors, with the sanction of a meeting of shareholders, might declare dividends; that, before recommending a dividend, they might set aside, out of profits, a reserve fund for contingencies, equalizing dividends, and other specified objects; and that they might declare and pay interim dividends.

Shares in the company were settled by will. At the death of the testator in 1884, there stood in the accounts of the company, to the credit of a reserve fund, £3000. By the date of the annual meeting of the company in October, 1888, the reserve fund had risen to £9000. Up to October, 1888, the shareholders had received each year, partly as "dividend," partly as "bonus," sums of various amounts: in 1888 equal to £12 10*s.* a share. In April, 1889, the directors resolved to divide £15,000 (£25 a share) as "special bonus"; and this amount was paid as "interim dividend" in April, 1889. About £5000 of extraordinary expenses were incurred, and a further dividend of £10 a share was paid in November of that year. The reserve fund was by that time reduced to £2000:—

Held, that the tenant for life of the settled shares was entitled to the whole of the amount divided.

THIS was an originating summons, taken out by the trustees of the will of *George Alsbury*, who died on the 25th of October, 1884, to determine whether a sum received by them in respect of shares in a company was, as between the tenant for life of the shares and those entitled in remainder, income or capital.

The Plaintiffs were *Benjamin Sugden* and *Theophilus Edward Jones*, the trustees and executors of the testator's will. The Defendants were *Eliza Alsbury*, the testator's widow, and *Mary Kate Sugden*, his only daughter, the wife of the first-named Plaintiff, and her children.

The testator by his will, after specific and pecuniary legacies, devised and bequeathed all his estate to the Plaintiffs, upon trust, as soon after his decease as might be deemed expedient, to sell and convert the same into money; and upon trust to invest

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the net proceeds in or upon any of the public funds, or Government or real or leasehold securities in *England* or *Wales*, or in or upon the stocks, shares, or securities of any railway or other public company, with power to vary the securities. Upon further trust to pay one moiety of the income to his daughter *Mary Kate Sugden*; and upon trust to pay the other moiety to his wife during widowhood; and upon trust, after the decease or marriage of his wife, to convert the trust fund into money, and divide the same among his children, including his daughter, *Mary Kate Sugden*, with a proviso that such division or payment should not be made to any such child till attaining twenty-one. The testator had one child only.

Part of the testator's estate, at the time of his death, consisted of thirty fully paid-up £50 shares in the *Kempton Park Racecourse Company, Limited*. The shares were retained by the Plaintiffs, and transferred into their names.

The company was registered in 1877. The memorandum of association provided: "The capital of the company is £30,000, divided into 600 shares of £50 each, of which 300 shares may be preferential. The company also takes power, on increase of capital, to issue preference or guaranteed shares or preference and guaranteed shares, as part or as the whole of such increased capital."

The articles of the company material to the question to be decided were:—

37. "The company may from time to time, by resolution of a general meeting, increase its capital by the issue of new shares, with or without preference, priority, or guarantee as regards dividends or otherwise over the shares in the then existing capital, or such other special rights or advantages as may be specified in such resolution; the aggregate increase to be of such amount and to be divided into shares of such respective amounts as the company in general meeting may direct, or, if no direction be given, as the directors think expedient; and the directors shall carry such resolution into effect in such manner as they shall deem expedient, subject to the provisions of these articles, and to any special directions given in reference thereto by the meeting at which such resolution shall be passed."

95. "The directors may, with the sanction of the company in general meeting, declare a dividend, to be paid to the members in proportion to their shares, provided that in case of the creation of any shares with any preference, priority, or other privileges, regard shall be had thereto in the declaration and payment of dividends.

96. "The directors may, before recommending any dividend, set aside out of the profits of the company such sum as they may think proper as a reserve fund, for acquiring property for the company, or providing for the payment of rents and the due performance of covenants, or for meeting contingencies, or for equalizing dividends, or for repairing or maintaining the property of the company, or forming an insurance fund, or for all or any of the purposes aforesaid, or for any other purposes of the company which they may think fit; and the directors may invest the sum so set apart as a reserve fund upon such securities and in such manner as they may determine.

97. "The directors may, if they think fit, in the interval between general meetings, declare and pay an interim dividend of such amount as they may think justified by the business of the company.

98. "No dividend shall be declared except out of the profits of the company."

No resolution had been passed to increase the capital of the company.

The course of dealing of the company with respect to the disposal of profits from the year 1883 was as follows:—

In the year ending on the 31st of October, 1883, no interim dividend was paid to the shareholders, and no extraordinary expenditure was incurred. From the previous year a balance (after payment of dividends) of £2,223 12*s.* 7*d.* was brought forward. The balance of profit at the end of the year amounted to £8617 4*s.* 6*d.* The disposal of that balance was authorized at the annual meeting of the company, held in November, 1883, in payment of a dividend of 10 per cent., and a bonus of 5 per cent. on the share capital, carrying £3000 to a suspense account, and carrying forward a balance of £1117. The directors reported to the meeting an anticipated extraordinary expenditure of £2000 during the next year.

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In the year ending on the 31st of October, 1884, an interim dividend of 5 per cent. was paid; extraordinary expenditure was incurred to the amount of £5072. At the end of the year the £3000 previously carried to a suspense account was placed to an account called "Reserve Fund." A further dividend of 5 per cent. and a bonus of 10 per cent. were paid to the shareholders, and a small amount was carried forward to the profit and loss account.

During the years 1885, 1886, and 1887, the shareholders were paid by way of interim dividends and bonus sums, amounting to 20 per cent. or £10 per share. In 1888 they received 25 per cent.

In 1885 large extraordinary expense was incurred, part of which was charged in the revenue account of the year. In 1886 further extraordinary expenditure was also incurred, which was not charged in the revenue account of the year. In 1887 a small amount of extraordinary expenditure was incurred. This, and the extraordinary expenditure of the two former years not previously charged in revenue accounts were charged in the revenue account of the year; and the reserve fund was increased to £6000. In the year 1888 a small extraordinary expenditure was incurred and charged in the revenue account, and the reserve fund was increased to £9000.

In April, 1889, the directors passed a resolution to pay the shareholders a "special bonus" of £25 a share. A sum of £750 was accordingly paid to the Plaintiffs in respect of the thirty shares held by them on trust. In the letters sent round to the shareholders the payments were called "interim dividends."

At the beginning of the year ending the 31st of October, 1889, the amount of profit brought forward, after providing for dividend and increasing the reserve fund to £9000, was £2268 7*s.* During the year extraordinary expenditure to the extent of £4928 4*s.* 1*d.* was incurred. In addition to the interim dividend of £25 a share, at the annual meeting in November, 1889, an additional dividend of £10 a share was declared, and the reserve fund was reduced to £2000, leaving a very small amount to be carried forward to profit beyond the £6000 required to provide for the 20 per cent. dividend then declared.

Oswald, for the trustees.

Cozens-Hardy, Q.C., and *Beddoes*, for the widow:—

None of the profits had ever been capitalized by the company. The whole of the reserve fund was profit which the company could deal with as income: *Bouch* v. *Sproule* (1). In that case there was a similar reserve fund, which, no doubt, was dealt with by the company (putting into operation at the same time their power to increase capital) in such a way as to capitalize not only the sum standing to the reserve fund, but part of the unappropriated profit standing to the account of profit and loss. The Law Lords, agreeing on that point with the Court of Appeal, considered that there was no difference between the reserve fund—a fund created in the lifetime of the testator—and the current profits; they treated the fund as one which the company had power to deal with as income. Here, it is to be observed, it was the directors, who had no power to pay anything except by way of interim dividend to the shareholders, who divided the £15,000. If it could be said that the reserve fund existing at the death of the testator could not be received by the tenant for life as income, the whole of that fund ought to be treated as having been applied by the company to the extraordinary expenses as they arose. Such expenditure was largely in the nature of capital expenditure. If the accounts are treated in that way, the whole of the reserve fund at the beginning of the last financial year will be found to have been accumulated during the time the settlement has existed, and should belong to the tenant for life. Supposing, however, the £9000 reserve existing at the beginning of the last financial year was capitalized as against the tenant for life, it was applicable to extraordinary expenses. About £5000 extraordinary expenses were incurred during the year; they ought to be treated as paid out of the reserve fund, leaving in view only some £2000 capital divided among the shareholders.

Napier Higgins, Q.C., and *MacSwinney*, for the other Defendants:—

The principle derived from the cases, and as finally settled by *Bouch* v. *Sproule* in the House of Lords, is, that what the company have done is the test of whether any sum derived either out

(1) 12 App. Cas. 385.

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of back profits or current profits applied for the benefit of or divided among shareholders is capital or income as between the persons interested in shares: *Lindley* on Companies (1). The facts of this particular case are governed by *Ward* v. *Combe* (2). The company have treated the reserve fund as floating capital; they have not been obliged to entrench upon it for contingencies or to equalize dividends out of profits of the last current year; they have been able to pay all extraordinary expenses and to divide an amount equal to the dividend in every previous year; they have given a "special bonus" of £25 a share in addition. This was treated by the directors, whose act was adopted by the company, as an unusual payment in the nature of capital; that is conclusive on persons interested in the shares. If the whole of that is not capital, so much as came out of the reserve fund—that is seven-fifteenths—is capital. At the lowest the amount by which the reserve fund accumulated in the testator's life has been reduced is capital.

Cozens-Hardy, in reply.

1890. May 15. NORTH, J. (after stating the facts, continued):—

At the beginning of the year ending October, 1889, there was standing to the credit of the reserve fund a sum of £6000. A further sum of £3000 was then added; so that it was increased to £9000. At the end of the year the amount was £2000 only; so that £7000 was gone. £15,000 was paid as dividend in April, 1889; and supposing that £7000 out of the reserve fund was used in payment of that dividend, at all events £8000 of the dividend came out of annual income. But I do not know that £7000 of that reserve fund did go to pay the interim dividend. I have no means of ascertaining out of what fund the money was paid. The report for the year does mention that extraordinary expenditure to the amount of about £5000 was incurred, which clearly would be payable out of the reserve fund. In all probability no distinction was made between the one set of payments and the other, as to what fund they were drawn from; but it is impossible to say that as much as £7000 of the dividend did

(1) 5th Ed., p. 545. (2) 7 Sim. 634.

come out of the reserve fund. I do not think it necessary, however, to examine into this question further; for it seems to me that in any event the whole of the dividend is income and not capital. I come to this conclusion from the perusal of the case of *Bouch* v. *Sproule* (1); a leading authority which contains a very clear exposition of the law, and which, to my mind, points to the conclusion that this is income. Although it was held in *Bouch* v. *Sproule* that the sum then in question was capital and not income, it is not necessary to go back to the decisions before that case. The question arose there in respect of a sum divided by a company, which seems to have been formed under articles very much resembling the articles of association of the company in the present case. The directors there had power, before recommending any dividend, to set aside out of profits such sum as they might think fit as a reserve fund for meeting contingencies, equalizing dividends, or repairing or maintaining works, with a provision that the directors might invest the sum so set apart. The facts are stated by Lord *Herschell*. They are shortly as follows: In the accounts of the company for the year beginning the 30th of June, 1874 (two years before the testator's death), there was standing to the credit of a reserve fund £100,000, made up of undivided profits of previous years. In August, 1880, the £100,000 was standing to the credit of the reserve fund, having been there ever since 1874; the whole of it, therefore, arose in the testator's lifetime. The directors then, having this money in their hands, proceeded to carry out a scheme by which the capital of the company would be increased. The way in which they proposed to do it was by declaring a bonus dividend of £2 10*s.* a share, being equal to £7 10*s.* for every three shares, and then creating 18,400 new shares of £10 each, upon which £7 10*s.* per share was to be paid up concurrently with the payment of the bonus dividend. As Lord *Herschell* says (2): "This would allow of one new share being allotted in respect of every three existing shares, and the bonus dividend would pay the £7 10*s.* on each such new share." Then he says, further on: "The case came in the first instance before Mr. Justice *Kay*. He considered that it might be open to doubt whether the bonus

(1) 12 App. Cas. 385. (2) 12 App. Cas. 389, 391.

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at the time it was declared belonged to the tenant for life, or was to be regarded as an accretion to capital, though, on the authority of *Paris* v. *Paris* (1), he inclined to the latter opinion. But he came to the conclusion that the bonus had been capitalized with the consent of the tenant for life, and that she had agreed that the shares should be treated as capital of the testator's estate, so as to avoid raising this question. The Court of Appeal reversed this judgment. They held that there was no evidence to shew that the tenant for life had agreed to relinquish any of her rights, and that the bonus belonged to her, and having been invested by the trustees in shares of the *Consett* company, those shares became her property. I quite concur with the Court of Appeal in thinking that there is no evidence that the tenant for life relinquished her right to the bonus if she was ever entitled to it. And, in my judgment, the sole question for determination is whether this bonus is to be regarded as income passing to the tenant for life under the trusts of the will, or an accretion to capital, to the income of which alone she was entitled, and which enured after her death for the benefit of the remainderman." Then he considers the cases, and, in the course of doing so, makes some observations which I think important. In speaking of the case of *Brander* v. *Brander* (2), he says (3): "I think the decision proceeded on the ground which Lord Justice *Fry* accurately states as the foundation of the judgment in *Irving* v. *Houstoun* (4), viz., that the accumulated profits had become part of the floating capital of the concern. But they had become so, not by reason of any declaration of the company that they should be so, but only in the sense that, having accumulated, they were, *de facto*, used as part of its capital. In this sense, however, all accumulated profits which are in use for the purposes of the business of any company, may equally be said to form part of its floating capital. And I think that the learned counsel for the appellants were well founded in saying that the greater part, if not the whole of the accumulated profits of the *Consett Iron Company*, the division of which has given rise to this controversy, were in this sense a portion of the capital of the company." So, using the words in

(1) 10 Ves. 185.
(2) 4 Ves. 800.
(3) 12 App. Cas. 393.
(4) 4 Pat. Sc. App. 521.

the same sense, I think in this case the reserve fund was in that sense a portion of the capital of the company.

Then, passing on to page 397, he says: "I quite agree with the Court below that, apart from the authorities to which I have alluded, the general principle for the determination of such a question as that before us, and in my opinion the only sound principle, is that which is well expressed in the judgment of Lord Justice *Fry*: 'When a testator or settlor directs or permits the subject of his disposition to remain as shares or stocks in a company which has the power either of distributing its profits as dividend or of converting them into capital, and the company validly exercises this power, such exercise of its power is binding on all persons interested under the testator or settlor in the shares, and consequently what is paid by the company as dividend goes to the tenant for life, and what is paid by the company to the shareholder as capital, or appropriated as an increase of the capital stock in the concern, enures to the benefit of all who are interested in the capital.'" That is a quotation; then he proceeds: "And it appears to me that where a company has power to increase its capital and to appropriate its profits to such increase, it cannot be considered as having intended to convert, or having converted, any part of its profits into capital when it has made no such increase, even if a company having no power to increase its capital may be regarded as having thus converted profits into capital by the accumulation and use of them as such." These observations apply exactly here. The company has power to increase its capital; it has passed no resolution to do so; and has not increased its capital. The fact that it has not done so is important. The case is quite different from one where a company has not power to increase its capital, where the fact of its returning profits and using them as capital is treated as an appropriation of them to such purpose. Lord *Herschell* then considers the particular transaction before them, the details of which are quite immaterial in this case, and he sums them up (1): "I cannot, therefore, avoid the conclusion that the substance of the whole transaction was, and was intended to be, to convert the undivided profits into paid-up capital upon newly-created shares. And the

(1) 12 App. Cas. 399.

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form in which the operations were effected points in the same direction." Then, looking at the judgments of the other Lords, Lord *Watson* says (1): "In a case like the present, where the company has power to determine whether profits reserved, and temporarily devoted to capital purposes, shall be distributed as dividend or permanently added to its capital, the interest of the life tenant depends, in my opinion, upon the decision of the company. I entirely concur in the observations made upon this point by Lord *Hatherley* (then Vice-Chancellor) in *In re Barton's Trust*" (2). Then he adds: "In my opinion, that rule must obtain, whether the profits with which the company is dealing belong to the current year, or have been previously reserved for the purpose of its business."

Lord *Bramwell* says (3): "The truth is, as said by the Court of Appeal, that a trader, whether sole or corporate, trades with all the money he has got, let him have got it how he may. A sole trader with a capital of £10,000 who makes in a year a profit of £2000 and spends £1000 only, leaving the other £1000 in his business, may well in the next year be said to have a capital of £11,000; not so where there is a partnership, whether an ordinary partnership or an incorporated partnership. There the undivided profits of any period, a year or shorter or longer time, continue to be undivided profits unless something in the articles of partnership or some agreement by all the partners makes them capital. They do not become capital by effluxion of time or by their being used in the trading." Then he puts another instance: "For example, a company makes a profit of £10,500 in a year. Suppose its capital to be £200,000, it divides the £10,000 giving 5 per cent. to its shareholders; trading with the £500 as with its other funds. It does this for four years with the same result of profit and dividend. At the end of the fourth year its undivided profits, including those brought forward, are £12,000, and it can and does pay 6 per cent. to its shareholders. Can there be a doubt of its right to do so? Is it not the fair and just thing as between a tenant for life and remainderman? I say Yes, and if true for four years it is true for

(1) 12 App. Cas. 401. (2) Law Rep. 5 Eq. 244.
(3) 12 App. Cas. 405.

forty. I think the right rule would be that contended for by Mr. *Rigby*. Make the date of the division the date for considering the rights"; and Lord *FitzGerald* says, taking the same view (1): "The reasoning and the decision of Lord *Hatherley*" (then Vice-Chancellor), "in *In re Barton's Trust* (2), then directly apply."

Now, that case is an exceedingly useful authority, and bears directly on the present case. There a sum arising from the undivided profits of previous years, amounting to £100,000, had got to the credit of a reserve fund in the lifetime of the testator. If the effect of that sum being carried and kept to the account of a reserve fund was that it had become capital, the decision of the Court of Appeal that it was profit would have been quite wrong. It is quite true that the decision of the Court of Appeal was reversed; but it was reversed on quite a different ground. The House of Lords took a different view in respect of the subsequent dealing by the company in distributing a bonus dividend and allotting new shares. It was considered by the House of Lords that that transaction amounted to an appropriation of accumulated profits to capital, and that the company had the power to, and did, decide that the accumulated profit should be capital. Although the House of Lords did differ from the Court of Appeal, they did not do so on the ground that the money had been appropriated to capital by being carried to a reserve fund; they took the same view as the Court of Appeal did as to that. The only question discussed before the House of Lords was, whether the profits had been capitalized by the company by the distribution of the bonus and the issue of new shares. Therefore, in my opinion, that case was decided in the House of Lords upon a transaction to which I can find no parallel in the present case. Here I find that the money paid to the trustees, from whatever source it came, whether from the reserve fund or the profits of the year, was dealt with as an interim dividend declared by the directors. Except as an interim dividend, the directors had no power to pay it at all; although a general meeting might have confirmed what the directors had done.

The only other point is, that it is found in the minutes of the resolution passed by the directors when they appropriated this

(1) 12 App. Cas. 408. (2) Law Rep. 5 Eq. 244.

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£15,000, that it was not expressed to be an interim dividend, but a special bonus. In my opinion, that can make no difference if the money came from what at the time was profit. The whole came from either profits made in the year or profits put by under the name of a reserve fund. In the reports it had been the practice to call a part of the money divided by the name of "bonus." For some reason—I suppose it was better for the selling value of the shares—it was the practice to pay a smaller fixed dividend, and a bonus in addition, rather than to pay a variable dividend; it might look better to find what was called dividend kept up at the same rate. In my opinion, the use of the phrase "special bonus" makes no difference. It merely meant that it must not be taken that the bonus which had at first been 2½ per cent., then 5 per cent., and then for some years 10 per cent., would continue at so large a sum as was then being divided; and that the shareholders must not calculate on having so large a sum again. Whatever the intended meaning of the words used was, we know what the facts were. On the principle of the decision in *Bouch* v. *Sproule* (1), in my opinion in this case there was clearly an appropriation by the directors of part of the accumulated profits to the payment of an interim dividend, and no appropriation by the company to capital; and even if the sum divided or any part of it came from the reserve fund, it was, as between the persons interested in the testator's estate, income and not capital.

Solicitor for the widow: *Arthur Cheese.*

Solicitor for the other parties: *W. A. Holcombe,* agent for *T. E. Jones, Manchester.*

(1) 12 App. Cas. 385.

D. P.

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[1881 W. 3237.]

NORTH, J.
1890
June 13.

Trust—Administration—Overpayment to Beneficiary—Costs.

A testator devised and bequeathed his residue to his wife and two sons, his executrix and executors, on trust for his wife for life, and after her death as to one-fourth for each of his two sons, and as to the other two-fourths respectively on trust for each of his two daughters and their children. The widow and sons proved the will during the life of the widow. She managed the estate; she paid sums of money in respect of each fourth by anticipation, one son received more than was paid in respect of the other shares. It turned out after her death that the estate was insufficient to bring up the other shares to an equality with what such son had received:—

Held, in an action to administer the testator's estate, that, it not being shewn that the deficiency had not arisen from subsequent wasting of the estate, neither son was liable as trustee to make good the deficiency of the other shares, and the son who had received the excess was not liable as beneficiary to refund; but that he could not be paid his separate costs as beneficiary because he had already received more in excess of his proper share than the amount of such costs.

THIS was the second further consideration of an action for the administration of the estate of Dr. *Forbes Benignus Winslow*, who died in March, 1874, testate, leaving his wife *Susannah Winslow* and four children—*Forbes Edward Winslow*, *Lyttleton S. Forbes Winslow*, Mrs. *Constance Stanier*, then the wife of *John Tudor Frere*, and *Susannah Frances a'Beckett*, surviving him.

The testator made a will and divers codicils by which he appointed his wife, his two sons, and *Thomas Ewing Winslow*, his executors and trustees.

The testator devised and bequeathed his residuary estate upon trust for his wife for life, and after her decease upon trust to transfer or pay one-fourth to each of his sons, to hold one other fourth upon trust for his daughter *Susannah Frances* and her children, to hold the remaining fourth upon trust for his daughter *Constance* and her children. He directed that any sum which he should have expended during his life in the purchase of an

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advowson for his son *Forbes Edward Winslow* should be taken into account in ascertaining his share of the residue. The testator expended a sum of £5000 in the purchase of an advowson for his son *Forbes Edward.*

The testator's will was proved by his widow and two sons, the other executor and trustee renouncing.

Down to the time of the institution of this action the testator's widow had the management of the estate. The testator's two sons joined in getting in moneys payable on policies, in selling certain railway stock, and getting in a mortgage debt. The moneys received by the three executors in respect of those transactions were paid into the banking account of the testator's widow, and subsequently dealt with by her in the administration of the estate. The testator's sons did not otherwise interfere with the administration. Previously to the commencement of the action the testator's widow paid various sums out of the estate to her sons as part of their shares in the residue, and applied other sums towards the shares of her daughters and their children. A part of the testator's assets consisted of lunatic asylums; they were carried on by the widow during her life under a power in the will successfully; they were afterwards carried on by the direction of the Court unsuccessfully; the goodwill was transferred to another place and disposed of. Considerable sums were paid out of the assets of the estate for rent and surrender of leases and premises at which the asylums had been carried on.

The action was commenced in 1881. The Plaintiffs were the infant children of Mrs. *Stanier* (then Mrs. *Frere*). The Defendants were the testator's widow, his two sons, and the other beneficiaries. Judgment was pronounced in August, 1884. The Chief Clerk made a general certificate answering the inquiries directed by the judgment on August 10, 1887. The certificate found that there was a balance of £2401 12*s.* 8*d.* due from the estate of the testator's late widow. The Chief Clerk submitted to the decision of the Court whether a surcharge brought in by Mrs. *a'Beckett* and her children against both the surviving executors in respect of moneys received by the three executors and paid into the banking account of the testator's widow and dealt with by her, ought to be allowed. He disallowed a surcharge

brought in by Mrs. *Stanier* against the Defendant *Forbes Edward Winslow* for £2893 11*s.* 5*d.*, in addition to £10,333 7*s.* 8*d.* admitted by him in the executor's accounts. This sum comprised the £5000 advanced by the testator in the purchase of an advowson and sums paid to him by the testator's widow on account of his fourth share in the residue. The Chief Clerk allowed a surcharge of £720 11*s.* 11*d.* against the Defendant *Lyttleton S. Forbes Winslow*, brought in by Mrs. *Stanier*.

On the 4th of July, 1888, an order was made on further consideration. The allowance of the surcharge of £720 11*s.* 11*d.* against the Defendant *Lyttleton S. Forbes Winslow* was confirmed; the other two surcharges were disallowed. The order provided for payment to the surviving executors of their general costs. The executor's accounts were directed to be continued. An account was directed of all sums received by or credited to the residuary legatees on account of their shares in the residue, with interest subsequent to the death of the tenant for life.

The Chief Clerk made his certificates in respect of the accounts and inquiries directed on further consideration. On the 1st of April, 1890, he found that the sums received by or credited to the residuary legatees in respect of their shares in the testator's estate, together with interest, were—as to the Defendant *Forbes Edward Winslow*, £13,294 7*s.* 5*d.*, of which £10,331 7*s.* 8*d.* was principal, £2,962 19*s.* 9*d.* interest; as to the Defendant *Lyttleton S. Forbes Winslow*, £9548 10*s.* 10*d.*, of which £7619 1*s.* 3*d.* was principal, £1929 9*s.* 7*d.* interest; as to Mrs. *a'Beckett* and her children, £9591 10*s.* 11*d.*, of which £7720 19*s.* 7*d.* was principal, £1870 11*s.* 4*d.* interest; as to Mrs. *Stanier* and her children, £9404 14*s.* 9*d.*, of which £7509 10*s.* 1*d.* was principal and £1895 4*s.* 8*d.* interest. The undistributed assets were not sufficient after payment of costs to bring the shares of the residue other than the share of *Forbes Edward Winslow*, up to the amount which he had been paid and debited with.

Napier Higgins, Q.C., and *Dundas Gardiner*, for Mrs. *Stanier* and her children, the persons now having the conduct of the action, and *Levett* for Mrs. *a'Beckett* and her children:—

Both the surviving trustees ought to be responsible for over-

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payments to one of the beneficiaries, it was their duty to see that such payments were made among the beneficiaries *pari passu*. The Defendant *Forbes Edward Winslow*, who was a trustee and himself received this trust money, at any rate ought to be ordered to refund sufficient to bring the other shares up to an equality with what he has received. The Defendant *Edward Forbes Winslow* having been overpaid, any costs he is allowed ought not to be paid to him, but they should be applied towards bringing the payments on account of the other shares up to what he had received.

a'Beckett-Turner, for Mr. *a'Beckett*.

Cozens-Hardy, Q.C., and *A. a'B. Terrell*, for the surviving executors:—

The rule with respect to payments to some beneficiaries where it turns out that there will not be sufficient to pay all to the same extent is, that if the deficiency arises from subsequent depreciation or wasting of the estate, a beneficiary is not liable to recoup any part of what he has received, and the trustee is not liable for breach of trust: *Lewin* on Trusts (1); *Fenwick* v. *Clarke* (2); *Peterson* v. *Peterson* (3); *Hilliard* v. *Fulford* (4).

In this case the payments to *Forbes Edward Winslow* were approved by the Court on further consideration, when they were allowed in the executor's accounts; the executors were on that occasion allowed their costs—that is conclusive that they were not guilty of any breach of trust; with respect to these sums, they never came to the hands of either of the surviving trustees as trustees. As matter of course, the executors having been allowed costs on the former occasion, when the facts were before the Court, they will get them now. If there are any separate costs of *Forbes Edward Winslow* in respect of his position as beneficiary, he submits to have them stopped.

Gazdar, for the trustee in bankruptcy of *Lyttleton S. Forbes Winslow*.

(1) 8th Ed. p. 356.
(2) 4 D. F. & J. 240.
(3) Law Rep. 3 Eq. 111.
(4) 4 Ch. D. 389.

Napier Higgins, in reply:—

The question of overpayment was in no way touched on further consideration; the position of *Forbes Edward Winslow* is different from that of the overpaid beneficiaries in the cases cited, inasmuch as he himself was a trustee, and it was his duty to see that the other beneficiaries received as much as he did.

NORTH, J.:—

The question arises in this way: the estate is divisible among four sets of persons. There were three executors—the testator's widow and his two sons—and although they all proved and acted to some extent, yet to a considerable extent the widow acted alone. She received and paid large amounts in transactions in which the sons took no part. Amongst other things she did, she distributed large sums among the beneficiaries. She did not do so equally, and it turns out now that one of the sons has received between two and three thousand pounds more than the others, taking capital and income together. After these payments were made the action was commenced; and I know from what I have seen of the proceedings in Chambers and in Court that the costs were very considerable; and, having regard to the nature of the estate, they must necessarily have been large. The action was heard upon further consideration at that time, and certain surcharges brought against the executors were dealt with by the Court. When the order on further consideration was made the executors, as distinguished from the executrix, were cleared—as the best proof of that they got their costs of the action. The executrix was in a different position; there was a balance found due from her which her estate was unable to pay. Thereupon it was argued before me, on further consideration, that certain sums which she had received were sums for which her co-executors and co-trustees were responsible; and hearing the matter fully argued I came to the conclusion that they were not liable. Generally speaking, when accounts are taken in Chambers, sums paid by an executor or trustee to a beneficiary are not allowed in the first instance. They are disallowed with a note that the payments have been made to the beneficiaries on account, and the matter is set right subsequently, when it appears there is sufficient in Court

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to bring the other beneficiaries up to an equality. I do not know why the usual course was not followed. I come to the conclusion that the payments were allowed because everybody was satisfied that there was no reason why the payments should not be allowed. Comment was made on the fact that the largest payments were made to one of the trustees; and an attempt was made to distinguish this case on that ground. It is quite true that he was a trustee. But the money was not paid to him in his character of trustee, and when he had received it it was not a sum he held as a trustee. For if he had he would have been charged with it in taking the accounts. The person who was charged with the amount paid to him was the widow alone. It was paid to him, the son, as a legatee; and although he was a trustee of the will, he was not a trustee of that sum.

It is said that on further consideration it was apprehended that it was possible that the estate might be insufficient to pay the other beneficiaries in full, because certain inquiries were directed. I am not satisfied that that is so, because in any event such inquiries would have been necessary in order to equalize the payments. It now turns out that after payment of costs the remaining assets will be insufficient to bring up the other three shares to an equality with what has been received by the defendant *Forbes Edward Winslow*. In the first place, it is argued that the estate of *Lyttleton S. Forbes Winslow* ought to be charged with that excess because being a trustee he had paid it. It is entirely inconsistent with the facts to say that he paid it; he never had it. With respect to *Forbes Edward Winslow*, it was paid to him before the action was brought as a beneficiary. In my opinion, there is no ground for saying that he is liable. The case of *Fenwick* v. *Clarke* (1) is conclusive on the subject. Then it is said that there is nothing to shew that the estate was sufficient at the time; and that if it was not, the beneficiary who was overpaid must account for what he has received in excess of his share. I think there is a strong *primâ facie* case for saying that the estate was then sufficient, though I have not direct evidence on the subject. There may be many reasons why the estate has since then considerably diminished. I know that the

(1) 4 D. F. & J. 240.

assets comprised two lunatic asylums which became certainly much less valuable than they had been, and considerable sums had to be expended in respect of the leases which may well have been at that time valuable property. Further than that, the expenses of this action must have been considerable, and further than that, a sum of upwards of £2000 has been found due from the estate of the widow. These circumstances give strong ground for saying that in all probability the inability of the estate to satisfy the shares arose from depreciation subsequent to the institution of the action: at all events, there is nothing from which I can come to the conclusion that it did not.

I am asked to deprive the three executors of their costs on the ground that there has been some breach of trust. There has been nothing of the sort. As matter of course, they will be allowed their costs, in the same way as they were allowed them on the occasion of the first further consideration. It may be that there are some separate costs coming to *Edward Forbes Winslow* in his character of beneficiary. If there are, they must be stopped, not because he is not entitled to them, but because he has been paid more than the amount thereof beyond what the others have received; and cannot have them over again.

The funds divisible are to be applied in the first place in bringing up the share of Mrs. *Stanier* and her children to an equality with that of *Lyttleton S. Forbes Winslow*; in the next place, in bringing up those two shares to an equality with that of Mrs. *a'Beckett* and her children; and then if there be any surplus it will have to be applied towards bringing those three shares up to an equality with what has been paid in respect of the other share.

Solicitors for Mrs. *Stanier* and her children: *Fairfoot, Webb & Rooke.*

Solicitors for Mrs. *a'Beckett* and her children: *Chester & Co.*

Solicitors for Mr. *a'Beckett*: *Bolton & Mote.*

Solicitor for the executors: *Van Tromp.*

Solicitors for the trustee in bankruptcy of *Lyttleton S. Forbes Winslow: Cole & Higson.*

D. P.

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[1888 K. 903.]

Patent—Validity—Amendment of Specification—Patents, Designs, and Trade Marks Act, 1883 (46 & 47 *Vict. c.* 57), *s.* 18.

A patent was granted for "a telescope ladder for domestic and other purposes." The invention consisted of two distinct ladders of equal length, one drawing up out of the other by pulling a cord, both ends of which were attached to the inner or sliding ladder, which could be adjusted at any height by means of a lever bracket, on which any of the steps of the sliding ladder could rest, thus keeping that ladder fixed in its place.

The specification claimed—"(1.) The two ladders occupying the space of one only. (2.) The ready means of working by the cord. (3.) The simple bracket lever by which the ladder is secured at any required length." The patentee afterwards obtained leave to amend his specification, and he amended it by striking out the whole of the claims numbered (1), (2), (3), and substituting for them the following as his claim: "The combination in a telescope ladder as herein described of means for raising, lowering, and stopping, all as herein described, and shewn in accompanying drawings." In an action for the infringement of the patent:—

Held, upon the construction of the whole specification as it stood before the amendment, that the claim was really for a combination, and that, consequently, the amendment was only a "correction or explanation," within the meaning of sect. 18 of the *Patents, Designs, and Trade Marks Act*, 1883, and did not "make the specification, as amended, claim an invention substantially larger than or substantially different from the invention claimed by" the original specification, and that, consequently, the amendment did not render the patent invalid.

TRIAL of action for the infringement by the Defendant of the Plaintiff's patent.

The Plaintiff claimed an injunction; damages or an account of profits; and other consequential relief.

By his statement of defence, the Defendant denied infringement, and also alleged that the patent was invalid for the reasons stated in his particulars of objection.

By the particulars of objection the Defendant said—(1.) That the specification did not sufficiently distinguish which of the matters and things therein described the Plaintiffs claimed to have invented, and which of the same were old. (2.) That the

specification as amended claimed an invention substantially larger than and different from the invention claimed by the specification as it stood before amendment. (3.) That if the specification was construed so as to include the Defendant's apparatus of which the Plaintiff complained as an infringement, the Plaintiff's alleged invention was not subject-matter for a patent, having regard to the state of public knowledge as hereinafter mentioned, and was not new, having been published within the realm in six prior specifications (the dates of which, and the names of the patentees, were given).

The Plaintiff's patent (No. 12,638 of 1886) was dated the 5th of October, 1886, and was for "A telescope ladder for domestic and other purposes."

The provisional specification contained the following description of the invention:—

"A telescope ladder, designed to take the place of the cumbrous ladders now in use, being two distinct ladders of equal length, one drawing up out of the other by pulling a cord at the side of the ladder, both ends of such cord being attached to the inner or sliding ladder, which is drawn out to its full extent with perfect ease in a few seconds of time. It can be adjusted to any height, and stopped at every tread, or nine inches, in ascending or descending, by means of a light strong lever bracket fixed to the lower ladder. This lever is raised by the ascending ladder, and drops down under each tread, becoming locked by the sliding-ladder descending and resting on it. This lever is raised, and the sliding ladder released, by a simple sliding rod running down the side of the lower ladder like the cord for raising, to within the convenient reach of the person working the ladder. The raising cord runs through pulleys near the top and bottom of the lower ladder. The steps or treads are flat, and placed edgewise near the face of each ladder; thus, being close behind each other, no inconvenience is felt when in use."

The complete specification contained a description of the invention by reference to drawings which accompanied it, and the claim was as follows:—

"Having now particularly described and ascertained the nature

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of my said invention, and in what manner the same is to be performed, I declare that what I claim is—

"(1.) The two ladders occupying the space of one only.

"(2.) The ready means of working by the cord.

"(3.) The simple bracket lever by which the ladder is secured at any required length."

The Plaintiff afterwards obtained leave to amend his specification, and he amended it by striking out from the claim paragraphs (1.), (2.), and (3.), and substituting for them the following:—

"The combination in a telescope ladder as herein described with (1) means for raising, lowering, and stopping, all as herein described and shewn in accompanying drawings."

Cozens-Hardy, Q.C., and *Macrory*, Q.C., for the Plaintiff:—

The Plaintiff's claim is for a combination, and no such combination exists in any of the specifications on which the Defendant relies as anticipations. The evidence proves infringement.

W. R. Bousfield, for the Defendant:—

All the parts of the Plaintiff's ladder are old. The Defendant has adopted a form of lever different from that which the Plaintiff uses. By his complete specification as it originally stood the Plaintiff made no claim for a combination. He claimed three things, each of which was old. A patentee is not entitled to amend his specification by striking out from it things which he has claimed, and introducing instead a claim, which he did not originally make, to a combination of those same things. This would be contrary to the provisions of sect. 18 (2) of the *Patents, Designs, and Trade Marks Act*, 1883.

(1) It was admitted at the trial that the word "with" in the substituted claim ought to be "of."

(2) Sect. 18: "(1) An applicant or a patentee may, from time to time, by request in writing left at the Patent Office, seek leave to amend his specification, including drawings forming part thereof, by way of disclaimer, correction, or explanation, stating the nature of such amendment and his reasons for the same."

"(8.) No amendment shall be allowed that would make the specification, as amended, claim an invention substantially larger than or substan-

[*Macrory*, Q.C., referred to *Bateman* v. *Gray* (1).]

The *intuitus* of the new claim is entirely different from that of the original claim. Sect. 5, sub-sect. 5, of the Act requires a patentee to make a distinct statement of his claim.

Even if the original specification had contained the claim to a combination, it would not have been the proper subject-matter for a patent. In such a combination there is no exercise of any inventive faculty: *Williams* v. *Nye* (2). The Plaintiff's new claim is either bad in itself, or it makes the patent invalid.

If the patent can be supported at all, it must be for the particular form of lever adopted by the Plaintiff, and then the Defendant has not infringed it, for he uses a different form of lever.

Cozens-Hardy, in reply:—

The Plaintiff has made a practical use of old elements by means of a combination previously unknown, and there is sufficient invention to make it good subject-matter for a patent.

On the fair construction of the original specification as a whole, the manifest intention was to claim the combination of the three things, and the amendment did not enlarge the claim. A claim for a combination of three things, A, B, C, is less than a claim to each of the three separately: *Hayward* v. *Hamilton* (3). The claim to a combination may not be a formal one, but the intention to make it is sufficiently plain: *Bateman* v. *Gray* (4).

Under the old law, a patentee could only alter his specification by a disclaimer—that is, by striking out something. Under sect. 18 of the Act of 1883, he can correct or explain his specification, as well as strike out something from it. In the present case the amendment amounts only to a correction or explanation.

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tially different from the invention claimed by the specification as it stood before amendment."

"(9.) Leave to amend shall be conclusive as to the right of the party to make the amendment allowed, except in case of fraud; and the amendment shall in all Courts and for all purposes be deemed to form part of the specification."

(1) 8 Ex. 906.
(2) 7 Rep. Pat. Cas. 62.
(3) Griffin Pat. Cas. 1884–6, p. 115.
(4) Macrory Pat. Cas. 116.

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June 18. NORTH, J. (after referring to the specification, continued):—

These claims are by no means happily expressed. The first is not very intelligible in itself; but, looking at the three together, and at the whole specification, I have no doubt that the Plaintiff meant to claim the combination of these various things.

It is said that the claim is not in accordance with the statute, because sub-sect. 5 of sect. 5 of the *Patents, Designs, and Trade Marks Act*, 1883, requires that "a specification, whether provisional or complete, must commence with the title, and in the case of a complete specification must end with a distinct statement of the invention claimed," and it is said that this is not "a distinct statement of the invention claimed." It is said (and I think accurately) that, whereas formerly a claim was not necessary, a claim is now required. But, even if any difficulty were caused by the section itself (I do not think there is), it is removed by the decision of the Court of Appeal in *Siddell* v. *Vickers* (1), which shews that this provision is merely directory, and that non-compliance with it does not make the patent void. It is merely a direction to the comptroller, or the law officer who has to deal with the matter when it comes before him, and, if he is satisfied, the mere non-compliance with this provision will not of itself make the patent bad. I think there was a claim to the combination, though I admit it was by no means happily expressed, and I think the Plaintiff was wise in proceeding to amend it. He made an amendment by striking out the three heads of the claim, and substituting for them this claim: "The combination in a telescope ladder as herein described of means for raising, lowering, and stopping, all as herein described, and shewn in the accompanying drawings." But I think that the specification, as it originally stood, did, in effect, as a matter of construction, claim that which it clearly does in express terms as amended. Then the objection that "the specification does not sufficiently distinguish which of the matters and things therein described the Plaintiff claims to have invented, and which of the same are old" has really no application when one understands that the claim is really to the combination as a

(1) 39 Ch. D. 92.

whole, and that that combination is the subject of the patent. As the whole combination is claimed, there is no ground for saying that there ought to be a distinction of the specific parts claimed, and which of them were old.

Then the next objection is, that "the specification as amended claims an invention substantially larger than and different from the invention claimed by the specification as it stood before amendment," and sub-sect. 8 of sect. 18 of the Act of 1883 is relied on. That sub-section provides, "No amendment shall be allowed that would make the specification, as amended, claim an invention substantially larger than or substantially different from the invention claimed by the specification as it stood before amendment." It must, however, be borne in mind that, whereas before this Act was passed, a patentee could amend his specification only by disclaimer, sub-sect. 1 of sect. 18 provides that amendment may be made "by way of disclaimer, correction, or explanation." In my opinion, that which has been done in the present case is by way of correction or explanation and not by way of disclaimer, and the result is that the Plaintiff has not claimed an invention substantially larger than or substantially different from that which was claimed by the specification as it originally stood.

Then the third objection is, "that, if the specification is construed so as to include the Defendant's apparatus, of which the Plaintiff complains as an infringement, the Plaintiff's alleged invention is not subject-matter for a patent, having regard to the state of public knowledge as hereinafter mentioned, and is not new, having been published within this realm" in six specifications, the particulars of which are given, and which are referred to as being anticipations of the Plaintiff's invention and preventing it from being novel. [His Lordship referred to the six specifications and the evidence relating to them, and continued :—]

In my opinion, there is nothing which justifies me in coming to the conclusion that any of these patents is an anticipation of the Plaintiff's. It has been proved that none of them, so far as the witnesses know, has ever been employed at all; and the Defendant has not been called as a witness, and he must necessarily have some knowledge upon the subject, he being a person whose

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trade is to make, amongst other things, fire ladders and fire escapes. He does not in any way contradict the statements of the Plaintiff and his witnesses.

The remaining point is, that the Plaintiff's invention is not the proper subject-matter of a patent. Now, what is meant by that? It is said that telescopic ladders are old, that endless cords and other things for working them are old, and that brackets, or something similar, for supporting the ladder when extended are old; and I am, therefore, asked to say that this invention, being merely a combination of certain old matters, is not the proper subject-matter of a patent. I have no materials, and I have heard no evidence, upon which I can come to that conclusion. I should have expected that some evidence would have been adduced for the purpose of shewing that there was really nothing new in the invention, but that it was merely the putting together of certain well-known old things in a manner which was also well known. But evidence for that purpose is entirely wanting. The particulars of objection say that the invention is not subject-matter for a patent, "having regard to the state of public knowledge as hereinafter mentioned"; that is, the public knowledge to be found in the specifications with which I have already dealt. Therefore I am left entirely without evidence of public knowledge, which might make it a serious question to be considered, whether there was proper subject-matter for a patent. I must have regard to this and to the Defendant's own conduct, and in particular to the fact that, at a time when he was acting as agent for the Plaintiff, he published a circular with reference to the Plaintiff's ladders, in which he said of them, "in point of utility there is nothing better." When I find that is what the Defendant, himself a man of experience in this class of business, says of the Plaintiff's ladder, it is impossible for me to come to the conclusion that there is not proper subject-matter for a patent.

I do not think the fact of infringement is really in dispute. It is suggested that there is a distinction between the form of lever bracket employed by the Defendant and that employed by the Plaintiff. The only difference which I can see between the two is, that the Defendant's is apparently a little less

advantageous than the other in a mechanical point of view. As to that there is no evidence; it is only my own opinion, formed on looking at it. But there is no defence in substance, and, in my opinion, the infringement is clear. The Plaintiff is entitled to an injunction and an account.

NORTH, J. 1890 KELLY v. HEATHMAN.

Solicitors: *Wolferstan & Avery; J. H. Johnson, Son, & Ellis.*

W. L. C.

In re HIRST'S MORTGAGE.

NORTH, J. 1890 *June* 28.

*Mortgage—Power of Sale—Sale reserving Minerals—Petition for Sanction of Court—Service on Mortgagor—*25 & 26 *Vict. c.* 108, *s.* 2 [*Revised Ed. Statutes, vol. xiv., p.* 481].

A petition by a mortgagee of land, under sect. 2 of the Act 25 & 26 Vict. c. 108, for the sanction of the Court to his selling the surface of the mortgaged property, with a reservation of the mines and minerals thereunder, must be served on the mortgagor.

Opinion of *Wickens*, V.C., in *In re Wilkinson's Mortgaged Estates* (1) dissented from.

PETITION under the Act 25 & 26 Vict. c. 108.

The Petitioners were first mortgagees in fee of land in *Yorkshire*. The mortgage deed did not contain a power of sale, but it did not contain any provision forbidding the sale of the land and the minerals separately. The mortgagees intended to exercise their statutory power of sale. The petition asked that the Petitioners as mortgagees might be at liberty to exercise all or any of the powers and authorities of their mortgage deed, or any statutory powers conferred on them as mortgagees by the *Conveyancing Act*, 1881, or otherwise, so as to dispose of the land and hereditaments comprised in the mortgage deed, "with an exception or reservation of the coals, mines, and minerals in and under the same, and the rights and powers of or incidental to the working, getting, or carrying away of such coals, mines, and minerals, and so as to dispose of the coals, mines, and minerals, with such rights or powers, separately from the residue of the land; and, in either case, without prejudice to any future exercise

(1) Law Rep. 13 Eq. 634.

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of the said trusts, powers, and authorities with respect to excepted coals, mines, or minerals, or to the undisposed-of land."

The petition had not been served on any one.

Swinfen Eady, for the Petitioners:—

The petition is presented under sect. 2 (1) of the Act 25 & 26 Vict. c. 108.

It has been held that this section applies to mortgagees on the ground that they are included in the description "other person authorized to dispose of land by way of sale": *In re Beaumont's Mortgage Trusts* (2). The petition in that case was presented by first mortgagees and the mortgagor, and Vice-Chancellor *Malins* held that it need not be served on subsequent mortgagees. And in *In re Wilkinson's Mortgaged Estates* (3), the petition was presented by first mortgagees and a sub-mortgagee of theirs. It was opposed by a *puisne* mortgagee. Vice-Chancellor *Wickens* said that *In re Beaumont's Mortgage Trusts* was conclusive to shew that the Act applies to mortgagees as well as to trustees. He said that he was also "satisfied that the order may be made, notwithstanding the opposition of one of the later mortgagees or the mortgagor. In this respect *In re Beaumont's Mortgage Trusts* is an *à fortiori* case, because it was there held that the appearance of the subsequent incumbrancers might

(1) Sect. 2: "Every trustee and other person now or hereafter to become authorized to dispose of land by way of sale, exchange, partition, or enfranchisement may, unless forbidden by the instrument creating the trust or power, so dispose of such land with an exception or reservation of any minerals, and with or without rights and powers of or incidental to the working, getting, or carrying away of such minerals, or may (unless forbidden as aforesaid) dispose of by way of sale, exchange, or partition the minerals with or without such rights or powers separately from the residue of the land, and in either case without prejudice to any future exercise of the authority with respect to the excepted minerals, or (as the case may be) the undisposed-of land; but this enactment shall not enable any such disposition as aforesaid without the previous sanction of the Court of Chancery, to be obtained on petition in a summary way of the trustee or other person authorized as aforesaid, which sanction once obtained shall extend to the enabling from time to time of any disposition within this enactment of any part or parts of the land comprised in the order to be made on such petition, without the necessity of any further or other application to the Court."

(2) Law Rep. 12 Eq. 86.

(3) Ibid. 13 Eq. 634.

be dispensed with. I conceive, therefore, that Vice-Chancellor *Malins* would have held, if necessary, that the mortgagor could be dispensed with. But independently of this, I should be most unwilling to lay down a rule which might give a subsequent incumbrancer with the remotest possible interest, or a mortgagor whose equity of redemption might be worth nothing, a position which would enable him to get bought off by refusing to allow the mortgagee to exercise his power of sale in a manner which he thinks on good grounds the most advantageous." These authorities justify us in not serving the petition on the mortgagor.

NORTH, J.:—

In my opinion, the petition ought not to be heard *ex parte*, but should be served on the mortgagor. I find that in *In re Palmer's Will* (1), in which the petition was presented by the trustees of a will, Vice-Chancellor *Wickens* held that the *cestuis que trust* ought to be made parties to the petition, and he ordered the petition to stand over for the purpose of making them parties. I can see no distinction in principle between a mortgagor and a *cestui que trust*. I am satisfied; and, if the mortgagor consents, the order may go without the matter being mentioned to me again. If he does not consent, it must be brought on again when he has been served.

Solicitors: *Taylor, Hoare, & Box.*

(1) Law Rep. 13 Eq. 408.

W. L. C.

NORTH, J
1890
July 11.

In re WILSON.
ATTORNEY-GENERAL *v.* WOODALL.

[1889 W. 795.]

Practice—Rules of Supreme Court, 1883, *Order* XVI., *rr.* 48, 55—*Order* LV., *rr.* 3 *to* 8—*Third Party Notice—Originating Summons.*

A third party notice is not applicable to proceedings by originating summons.

AN originating summons was taken out by the Attorney-General asking for an account of charitable trust funds, in lieu of an account that had been directed to be taken in an administration action and the settlement of a scheme. The Defendants to the summons were the legal personal representatives of four trustees, who executed a deed dated 1852, relating to property bequeathed by *Richard Wilson*, who died in 1837, having by his will declared the trust in question. The summons, in addition to being taken out as an originating summons, was entitled in the administration action and in the matter of the *Charitable Trusts Acts*.

On the 4th of February, 1890, *William Otter Woodall*, the first Defendant to the summons, the executor of the last survivor of the four trustees, obtained an order giving him leave to issue a notice to certain beneficiaries under the will of *Henry Fowler*, one of the four trustees who executed the deed of 1852, pursuant to the rules of the Supreme Court, Order XVI., r. 48, and to serve them with a copy of the originating summons. The Defendant, *William Otter Woodall*, also served a notice under Order XVI., r. 55, on three of his co-Defendants, the executors of *Henry Fowler*, claiming to be entitled to contribution from them. A motion was now made on behalf of the persons served with the third party notice under Order XVI., r. 48, and the Defendants served with notice under Order XVI., r. 55, that the order of the 4th of February, 1890, and the notices on them, might be set aside on the ground of irregularity.

Cozens-Hardy, Q.C., and *J. G. Wood*, for the motion :—

There can be no distinction for the purpose of this motion

between a notice under rule 55 of Order XVI. on a co-Defendant and an order and notice under rule 48.

The provisions of rule 48 are in their terms inapplicable to a proceeding not commenced by writ of summons in which the ordinary pleadings in an action are put in. The course of summary proceeding by way of originating summons is inconsistent with a third party notice.

Napier Higgins, Q.C., and *Haldane*, Q.C., for *William Otter Woodall*:—

We admit that we cannot distinguish the notice under rule 55 from the order and notice under rule 48.

An originating summons is an action: *In re Fawsitt* (1).

The reason for allowing a third party notice is as much applicable to an originating summons as to an action commenced by writ. The forms are flexible, and are to be varied to meet the circumstances. The *Judicature Act*, 1873 (36 & 37 Vict. c. 66), s. 24, sub-s. 3, and the rules contemplate that third party notices should be given in any proceedings where they are advantageous.

NORTH, J.:—

I think this application must succeed—I think so because of the terms of the rule 48 of Order XVI. The directions in that rule clearly point to proceedings in an action following the usual course of procedure. I do not doubt that a proceeding commenced by originating summons is an action. But it is not an action in which a defence has to be put in. The having to do so is referred to in rule 48 as being essential; the rule provides that the notice shall, unless otherwise ordered, "be served within the time limited for delivering his defence." That points to the form of procedure in an action commenced by writ of summons. So the words at the end of the rule are: "If there be no statement of claim, then a copy of the writ of summons in the action." The words used are "the writ of summons"; there is no reference to an originating summons.

But the principal ground on which I decide the case is outside the terms of that order. I do not think the form of procedure to

(1) 30 Ch. D. 231.

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be observed under an originating summons is of such a character as to fall in with the bringing in a third party by notice. The form of procedure is, I think, inconsistent with doing so. For example, turning to rule 3 of Order LV., which declares the nature of the relief which can be given on originating summons. The rule in the first place defines certain classes of persons who "may take out, as of course, an originating summons returnable in the Chambers of a Judge of the Chancery Division"; then it defines the nature of the relief that may be obtained. Rule 4 extends to administration; and rule 5 provides what persons are to be served with the summons in the first instance in the several cases in which an originating summons may be taken out. Rule 6 provides that the Court or a Judge may direct such other persons to be served with the summons as they or he shall think fit. Rule 7 provides for such evidence in support of the summons as the Court or a Judge may require, and for directions being given for the trial of questions arising out of the summons. Rule 8 provides that the Court or a Judge may pronounce such judgment as the nature of the case may require. I do not think the proceedings contemplated there are such as to include the issue of a third party notice. Under these circumstances, I come to the conclusion that the parties who ask to discharge the order are right, and I allow the motion with costs.

Solicitors for Applicants: *Field, Roscoe, & Co.*, agents for *Tate, Cook, & Fowler, Scarborough.*

Solicitors for Defendant, *William Otter Woodall: Collyer-Bristow, Russell, & Hill.*

D. P.

In re WARE.
CUMBERLEGE *v.* CUMBERLEGE-WARE.

STIRLING, J
1890
June 5, 21

[1890 W. 518.]

Will—Power of Appointment—Objects of Power designated Nominatim—Gift over to same Objects in Default—Death of one Object in Lifetime of Donee of Power—Validity of Power—Exclusive or Distributive Power—Representatives—Marriage Settlement — Covenant to settle Wife's Property—Defeasible Reversionary Interest.

Where power is given by will to appoint a fund among several objects, with a gift, in default of appointment, to the same objects *nominatim*, and all the objects survive the testator, the power remains as to the whole fund, notwithstanding the death of one of the objects in the lifetime of the donee of the power.

The doctrine of *Boyle* v. *Bishop of Peterborough* (1) applied.

In the absence of sufficient evidence in the will to the contrary, "representatives" must be construed in its ordinary and primary meaning of "legal personal representatives."

In re Crawford's Trusts (2) applied.

A marriage settlement contained a covenant by the husband for the settlement of all personal estate which at any time during the coverture should come to or "vest" in him in right of his intended wife or in her by bequest, gift, or otherwise:—

Held, that a reversionary interest in a legacy in default of appointment, which vested in the wife during the coverture, though liable to be divested by the exercise of the power of appointment, was included in this covenant.

ADJOURNED SUMMONS.

Samuel Ware by his will, dated the 5th of July, 1859, after appointing his nephews "executors and trustees," and declaring that "the trustees, future trustees, the executors, their heirs, executors, or administrators," should be chargeable only for such moneys as he or they might respectively receive, and directing his "executors herein named" to make and sign an inventory of all his estates and effects, gave and bequeathed "unto each of the persons hereinafter named, to and for his or her own absolute use and benefit, the sum affixed to his or her name, except as hereafter limited. The above-named *John Cumberlege*, Miss *Cumberlege*, the above-named *Samuel Francis Cumberlege* and

(1) 1 Ves. 299. (2) 2 Drew. 230.

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Mrs. *Cautley*, brothers and sisters, each ten thousand pounds," and after various specific and pecuniary legacies, and a direction that the legacies were to carry £4 per cent. until payment, the testator then proceeded as follows: "I limit the absolute use and benefit of the capital sums of the legacies to my nephew the Rev. *John Cumberlege* and his sister Miss *Cumberlege*, together £20,000, so that those sums may be left by them respectively after their deaths in such proportions as they may appoint to their brothers or sisters, *Charles Nathaniel Cumberlege*, *Samuel Francis Cumberlege*, and Sister *Catherine Cautley*, in failure of appointment to be equally divided between the three or their respective representatives. Nevertheless, I direct that the survivor of the Rev. *John Cumberlege* or his sister Miss *Cumberlege* may succeed by the appointment of the other to his or her interest of the 4 per cent. in the respective £10,000 for his or her life as the case may be."

After giving various annuities, the testator then directed, "The legacies to my nieces, Miss *Cumberlege* and Mrs. *Cautley*, are to be invested as the trustees or majority of them approve, and the interest therefrom, together with the annuities before mentioned to females, are to be in trust with my executors" for those female annuitants for their separate use, with a proviso that in the event of bankruptcy or assignment such interest or annuity should cease and fall into the residue, "except in the case of Mrs. *Cautley*, whose legacy is to go to her children according to her appointment, and in default to them absolutely." The testator then settled his freeholds and copyholds on his said nephew, *Charles Nathaniel Cumberlege*, directing him to assume the name of *Ware*, to whom he also bequeathed his residuary estate, subject to the payment thereout of his debts, funeral and testamentary expenses, and legacies.

On the 12th of December, 1860, the testator died; his will was duly proved, and two sums of £10,000 were invested in the names of the trustees for the benefit of the said *John Cumberlege* and *Anne Jane Cumberlege*, in the will called Miss *Cumberlege*. *Charles Nathaniel Cumberlege* assumed the name of *Ware* in accordance with the testator's directions.

The Rev. *John Cumberlege*, who died in March, 1869, by his

will of the 21st of March, 1861, appointed a life interest in his legacy of £10,000 to *Anne Jane Cumberlege*, and by a second codicil of the 23rd of February, 1869, after reciting, that owing to the death of his sister, *Mary Catherine Cautley*, he was unable to leave her anything, gave and bequeathed, subject to the life interest therein of his sister *Anne Jane Cumberlege*, one-third of his £10,000 legacy to his brother *Charles Nathaniel Ware*, and the other two-thirds to his brother *Samuel Francis Cumberlege*.

Anne Jane Cumberlege, who died in October, 1889, by her will of the 10th of September, 1887, appointed her £10,000 legacy equally between her brother *Charles N. Ware* and *Samuel Francis Cumberlege*.

Charles Nathaniel Ware died on the 22nd of September, 1888, having made a will, which was duly proved by his executors therein named.

Mary Catherine Cautley was married in 1843, and by the settlement made on her marriage and dated the 12th of July, 1843, her husband, Mr. *Cautley*, covenanted with the trustees to settle (*inter alia*), all "other personal estate which upon the said intended marriage, or at any time during the said intended coverture, shall come to or vest in the said husband in right of his intended wife, or in her the said *Mary Catherine Cumberlege*, by bequest, gift, or otherwise."

Mrs. *Cautley* died in July, 1867, leaving her husband, and certain children of the marriage her surviving, and having exercised the power of appointment given her by the testator, *Samuel Ware*, over her individual legacy of £10,000, in favour of her children.

Samuel Francis Cumberlege as surviving trustee of the will of the said *Samuel Ware*, and one of the beneficiaries under the power of appointment, now took out an originating summons under Order LV., rule 3, to determine who were the persons entitled to the investments representing the said two sums of £10,000 and £10,000, and for what interests and in what shares or proportions respectively. The questions raised were whether the appointments by *John Cumberlege* and *Anne Jane Cumberlege* respectively were valid, and whether "representatives" meant next of kin, children, or legal personal representatives, and, if

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the last, whether Mrs. *Cautley's* share in any unappointed part was bound by the husband's covenant in the settlement of July, 1843.

Giffard, Q.C., and *A. Bailey*, for the Plaintiff:—

The power of appointment given by the testator to *John* and *Anne Jane Cumberlege* was an exclusive power; there can be no question as to this with regard to *Anne Jane Cumberlege's* appointment, because that was made subsequently to 37 & 38 Vict. c. 37. But as to *John's* appointment we say, first, that the power was an exclusive one—it is to be exercised in favour of brothers "or" sisters—therefore he could select from the class: *In re Veale's Trusts* (1); secondly, even if the power was not exclusive, still the appointment made by *John* was good, for all the objects of the power survived the testator; and though one of them died in the lifetime of the donee of the power, still the power of appointment over the whole fund remains: *Boyle* v. *Bishop of Peterborough* (2); *Woodcock* v. *Renneck* (3); *Paske* v. *Haselfoot* (4); *Jarman* on Wills (5).

Therefore, as to *John's* appointment, the Plaintiff takes two-thirds, and *C. N. Ware's* legal personal representatives take the other one-third. As to *Anne's* appointment, Plaintiff takes half of the fund, and one-third of the other half in default of appointment; then a further question arises as to who is to take the two-thirds of the unappointed half of this fund. [*Butcher* v. *Butcher* (6), *Reade* v. *Reade* (7), *Doe* v. *Thorley* (8), *Sugden* on Powers (9), and *Farwell* on Powers (10), were also mentioned.]

Phipson Beale, Q.C., and *W. Cowell Davies*, for the executors of *C. N. Ware*, adopted the argument of the Plaintiff's counsel on the question of the power being an exclusive one, and that in any event *John's* appointment was good:—

There is nothing in the will to shew that "representatives" is to have any meaning other than the *primâ facie* meaning of

(1) 4 Ch. D. 61; 5 Ch. D. 622.
(2) 1 Ves. 299.
(3) 4 Beav. 190; 1 Ph. 72.
(4) 33 Beav. 125.
(5) Vol. ii., 4th Ed., p. 265.
(6) 9 Ves. 382.
(7) 5 Ves. 744.
(8) 10 East, 438.
(9) 8th Ed., pp. 421, 423.
(10) Page 134.

"legal personal representative": *In re Crawford's Trusts* (1); therefore we claim one-third of the unappointed moiety of *Anne's* fund. The present case is distinguishable from *In re Horner* (2).

H. Wace, for one of the next of kin, also adopted the argument of Plaintiff, that the appointment was good:—

I contend that "representatives" here means "next of kin." Throughout the will the testator has used the word "executors" correctly to denote legal personal representatives when necessary; therefore, "representatives" must have been used by the testator in a different sense: *Walker* v. *Marquis of Camden* (3); *King* v. *Cleaveland* (4); *Walter* v. *Makin* (5).

The next of kin, according to the statute, therefore, are entitled, and as joint tenants: *Booth* v. *Vicars* (6); *Stockdale* v. *Nicholson* (7).

Hastings, Q.C., and *Lemon*, for Mr. *Cautley*:—

We contend that "representatives" means legal personal representatives; and as to cases which are relied on to shew that these words mean next of kin, we claim the benefit of remarks on some of them in *In re Crawford's Trusts*. Mr. *Cautley*, as the representative of his wife, is therefore entitled to whatever portion of this fund is unappointed. We further say that this share, whatever it be, is not bound by his covenant to settle his wife's after-acquired property. This share was not "vested" in his wife during the coverture; "vest" must mean indefeasibly vest in possession, and during the life of the donees of the power it was always liable to be divested by an appointment: *In re Mackenzie's Settlement* (8); *In re Jackson's Will* (9).

[STIRLING, J., referred to *Sweetapple* v. *Horlock* (10).]

The power of appointment was a non-exclusive one; the words "or sisters" is clearly a mistake for "and sister."

[*Ricketts* v. *Loftus* (11) was also mentioned.]

(1) 2 Drew. 230.
(2) 37 Ch. D. 695.
(3) 16 Sim. 329.
(4) 4 De G. & J. 477.
(5) 6 Sim. 148.
(6) 1 Coll. 6.
(7) Law Rep. 4 Eq. 359.
(8) Ibid. 2 Ch. 345.
(9) 13 Ch. D. 189.
(10) 11 Ch. D. 745, 754.
(11) 4 Y. & C. Ex. 519.

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Buckley, Q.C., and *Butcher*, for the trustees of Mrs. *Cautley's* marriage settlement:—

The fund is a non-exclusive one; the fund was, by the will, in effect, vested in three named persons, or their representatives, liable to be divested by appointment. On the death of Mrs. *Cautley*, one of the objects of the power, the power came to an end. The decision in *Woodcock* v. *Renneck* (1) was on the express words of the particular will. In all the cases relied on by the Plaintiff's counsel the gift was to a class, whereas here it is to certain named individuals. If, as we contend, the power came to an end on the death of Mrs. *Cautley*, then the statute 37 & 38 Vict. c. 37, has no operation, and, therefore, *Anne's* appointment was also bad. *White* v. *Wilson* (2) was also referred to.

We also contend that "representatives" means legal personal representatives; but we say also that whatever share Mr. *Cautley*, as the legal personal representative of his wife, takes, it is bound by his covenant, and must be settled. The present case is covered by *In re Jackson's Will* (3), on which we rely.

Austen-Cartmell, for a son of Mrs. *Cautley*:—

I contend that "representatives" means children; the share in default of appointment that comes to Mrs. *Cautley* is included in the word "legacy," and Mrs. *Cautley's* legacy was expressly given, in default of appointment, to her "children"; and this is what the testator intended by the term "representatives."

STIRLING, J.:—

As to part of this case, I may dispose of it at once. The first question arises upon the meaning of the words "their brothers or sisters, *Charles Nathaniel Cumberlege*, *Samuel Francis Cumberlege*, and Sister *Catherine Cautley*," which are not strictly grammatical. I assume, without thinking it necessary to decide it, that the gift is in such proportions as *John* and *Anne* may respectively appoint to those three persons. *John* and *Anne* have made appointments under that power, and the question is, whether, under

(1) 4 Beav. 190. (2) 1 Drew. 298.
(3) 13 Ch. D. 189.

the circumstances of the case, those appointments are valid. In support of them has been cited the well-known case of *Boyle* v. *Bishop of Peterborough* (1), followed, as it has been, by *Ricketts* v. *Loftus* (2); and it is said that those cases shew that the power subsisted, and was exercisable in favour of the survivors of the three persons who were named.

A distinction was sought to be drawn between the present case and those to which I have referred, on the ground that the gift there was to a class, and that in the present case it is to named individuals. But it is to be observed, that no case has been cited which is a decision that the doctrine laid down in *Boyle* v. *Bishop of Peterborough* does not apply to a case where the objects of the power are named, and not simply described as a class. In *Boyle* v. *Bishop of Peterborough* the doctrine was applied in the case of gifts to children as a class. It was extended (or, perhaps, I ought not to say extended, but applied) in the case of *Ricketts* v. *Loftus*, to a gift where the objects of the power were all of them named, but described as the sons and daughters of a certain person by his wife; and I am asked at this time, after the passing of the Act of 1874, not to extend it to a case where the persons who are the objects of the power are indicated by name, and not by description, so as to constitute a class. I think I ought not to accede to that view. There is no authority that compels me to adopt that view, and it seems to me that it is inconsistent with the view which has been taken by the profession, as indicated by the three text-writers who have been referred to in the course of the argument, namely, Mr. *Jarman*, Lord *St. Leonards*, and Mr. *Farwell*. In Mr. *Jarman's* book the law is laid down thus (3): "Where a power is given by will to appoint property among several objects, and the subject, in default of appointment, is given to them individually (and not as a class) as tenants in common, a question sometimes arises whether, by the death of any of the objects, the power is defeated in respect of the shares of those objects. The established distinction seems to be, that if all the objects survive the testator, and one of them afterwards dies in the lifetime of the donee of

(1) 1 Ves. 299. (2) 4 Y. & C. Ex. 519.
(3) Vol. ii., 4th Ed., p. 265.

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the power, the power remains as to the whole. But, on the other hand, if any object dies in the testator's lifetime, by which the gift lapses *pro tanto*, the power is defeated to the same extent." So that Mr. *Jarman* does not treat the doctrine as resting on the objects being described as a class; but he appears to indicate his opinion to be the contrary, because he refers to the subject in default of appointment being given to them individually, and not as a class. Then I have been unable, in the course of the examination which I have given to the passages referred to in Lord *St. Leonards*' book, to find any indication of his view being different; and when we come to the last writer of all, he apparently takes the view that the doctrine applies whether or not the objects of the power are described as a class or are named. In Mr. *Farwell's* book, the law is laid down in this way (1): "Where a power is given by will to appoint property amongst several objects, and the subject, in default of appointment, is given to them *nominatim and not as a class, as tenants in common*, the death of any of the objects of the power, before the testator, will to that extent defeat the power and the devise over; the power and devise over will only remain as to the shares of the survivors." Then he goes on: "If, however, an object survive the testator, but die before the donee of the power, the power and devise over will remain." Seeing that there is no decision to the contrary, and seeing, as I gather from the text-writers, that the view that has been taken by the profession is, that it extends to a case in which the objects of the power are described *nominatim*, as well as a class, I think I ought not to draw the line in the way which I am asked to do, especially having regard to the fact that the Legislature has since intervened, and by the Act of 1874 (37 & 38 Vict. c. 37), has really abolished altogether the rule that where the power is given to appoint to three persons, you must appoint something to each of them, otherwise the exercise of the power is bad. I think, therefore, that the exercise of the power by the wills of *John* and *Anne* is good.

But, then, that does not quite exhaust the case. There is a lapse as regards the appointment made by the will of *Anne*, by reason of her brother *Charles* having died in her lifetime; and

(1) Page 134.

that raises the question how it is to go in default of appointment. The will gives it in default of appointment thus: "In failure of appointment, to be equally divided between the three or their respective representatives." Several questions arise upon that as to the force of the word "representatives." Having regard to the last argument that has been addressed to me, I should like to read through the will again, and consider the effect of it, and therefore I will postpone giving my judgment on that part of the case for a day or two.

June 21. STIRLING, J. (after reading the will, and stating generally the effect of the different bequests, continued):—

Now, the first question I have to consider is, what is the meaning of the words, "or their respective representatives"? That was considered in a well-known case before Vice-Chancellor *Kindersley* of *In re Crawford's Trusts* (1). He there laid down that the words were to be taken, in the absence of context to the contrary, as meaning executors or administrators of the person represented—not the next of kin. That case has been repeatedly cited with approval, and followed; and I take it that the principles laid down in it are binding on me, whatever my own individual opinion might have been; but I desire to say that, so far from feeling any doubt or desire to differ, I find myself, having read the judgment most carefully, in entire accord with what is laid down there, and I cordially assent to every word of the Vice-Chancellor's judgment.

That being so, all I have to consider is this—whether on this will there are any circumstances which would lead me to infer that the testator used the word "representatives" in any other than its primary legal sense. Now it is to be observed, in the first place, that the gift which is made in favour of the three, "or their respective representatives," is not an immediate gift, but is one after the determination of prior life interests and in default of appointment; and, as is pointed out by the Vice-Chancellor in *In re Crawford's Trusts*, there is no presumption from that state of circumstances that the testator used the word

(1) 2 Drew. 230.

STIRLING, J. otherwise than in its primary meaning, namely, executors or administrators.

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Then, that being so, it seems to me that really the only circumstance which is in favour of an opposite construction is that the testator has twice used the words "executors and administrators" in the course of his will. The mere appointment of executors I cannot think is a circumstance to which any weight is to be attached at all. It occurred in the very case of *In re Crawford's Trusts* (1), and was disregarded by the Vice-Chancellor. But in *In re Crawford's Trusts*, it is true, the word "administrator" did not occur. It is observable, however, in the present case that the words "executors and administrators" are used always in connection with reference to trustees in the first instance, and in the second instance in a limitation to the residuary legatee. The Vice-Chancellor says emphatically that he adheres to the principle laid down by Lord *Cottenham*, in *Attorney-General* v. *Malkin* (2), that slight circumstances ought not to be considered as affording sufficient evidence of the testator's intention to use the term which he has chosen to employ otherwise than in its ordinary legal sense. Although no case has been cited precisely on all fours with this, in my judgment, there is not sufficient on this will to afford evidence that the testator intended to employ the words "their representatives" otherwise than in their ordinary legal sense. I hold that by "representatives" are meant legal personal representatives of the persons referred to.

That, however, does not entirely conclude the case, because a further question arises as to the share which, under those circumstances, was given to Mrs. *Cautley*. It is contended, in the first place, that that share of the legacy in which *Anne Cumberlege* took a life interest ought to go to the children of Mrs. *Cautley* under the clause which I have read, viz., "except in respect of Mrs. *Cautley*, whose legacy is to go to her children according to her appointment, and in default to them absolutely." The question there is, whether the word "legacy," as used in that portion of the will, refers to or includes the share of each of the legacies, which, in default of appointment, were to be equally divided between the three, "or their respective representatives."

(1) 2 Drew. 230. (2) 2 Ph. 64, 68.

Now, I have, for the purpose of coming to a conclusion on that, read the will very carefully; and it seems to me that throughout the will, down to the passage which is referred to, where the testator speaks of a legacy to Miss *Cumberlege*, or to Mrs. *Cautley*, or to the Rev. *John Cumberlege*, he means the sum of £10,000, in which those persons respectively take the limited interests which were conferred by the will. I see no reason to suppose that when he referred to the legacy of Mrs. *Cautley*, and directed it to go to her children, according to her appointment, and in default to them absolutely, he used the word in any other sense. I think, therefore, that this share of the legacy given to *Anne Cumberlege* does not go to Mrs. *Cautley's* children under the clause to which I have referred.

Then the next question that arises is this—is it bound by the covenant for the settlement of after-acquired property contained in the settlement made on the marriage of Mr. and Mrs. *Cautley* in the year 1843, long prior to the date of this will and the death of the testator? [His Lordship then stated the settlement, and read the covenant by Mr. *Cautley in extenso*, and continued:—] Then follow the trusts which are in terms applicable to reversionary legacies and interest.

Now the question is, is this personal estate which at any time during the intended coverture came to or vested in *Joshua Cautley*, in right of his intended wife, or in the said *Mary Cumberlege*, by bequest, gift, or otherwise? What was the nature of the interest conferred by the will of *Samuel Ware* which I have read? It has plainly conferred on Mrs. *Cautley* a vested interest —an interest which, upon the death of the testator, became vested in Mrs. *Cautley*, liable to be divested by the exercise of the power of appointment conferred on Miss *Cumberlege*. Does such an interest fall within the terms of the settlement? The words of the settlement are, "any personal estate which during the coverture shall come to or vest in *Joshua Cautley*, in right of his wife, or in her by bequest, gift, or otherwise." It did vest in Mrs. *Cautley* by bequest during the coverture; and I can see no reason for holding that the word "vest" there is used otherwise than in its strict legal sense, which is vested in interest, and not in possession. In my judgment, therefore, the share of Mr. *Cautley*

STIRLING, J. is bound by the covenant in the settlement, and goes accordingly. I may add, it seems to me that the case of *In re Jackson's Will* (1), although not on all fours with the present case, is an authority in favour of the conclusion to which I have come.

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Solicitors: *Baileys, Shaw, & Gillett; Wade & Lyall.*

(1) 13 Ch. D. 189.

W. W. K.

LEWIS'S *v.* LEWIS.

KEKEWICH, J.

[1890 L. 832.]

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June 28; *July* 16.

Practice—Consent Order—Withdrawal of.

Although a compromise entered into by counsel under the authority implied by their employment is binding on the client, and cannot be upset by the Court, a compromise entered into in intended pursuance of terms consented to by the client but by misapprehension not strictly following them, is not binding on the client.

Matthews v. *Munster* (1) distinguished.

THIS was a motion on behalf of the Plaintiffs in the action for leave to withdraw their consent to an order made on the 7th of June, 1890, and for liberty to renew their original notice of motion of the 12th of May, for an injunction to restrain the Defendant from using the word *Lewis's*.

The circumstances under which the application was made were as follows:—

The original motion came on before Mr. Justice *Kekewich* on the 17th of May, when it was ordered to stand over till the 7th of June. In the interval negotiations for a settlement of the action were carried on between the solicitors in the country, and on the 24th of May, 1890, the Defendant's solicitors wrote to the Plaintiffs' solicitors a letter as follows:—

"Our client is anxious for peace, and therefore will concede the use of the word '*Lewis's*,' either alone or jointly with any initials; and will consent to a perpetual injunction restraining him from using the word as above indicated, and will pay the taxed costs. Our client is naturally anxious to avoid further costs being incurred, and with this object perhaps you will be good enough to wire your clients the purport of the above on receipt of this letter."

On the 27th of May, the Plaintiffs' solicitors wrote to the Defendant's solicitors, stating the receipt of the above letter, and suggesting that minutes should be prepared and agreed to before

(1) 20 Q. B. D. 141.

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the matter was mentioned in Court again, so as to avoid all dispute.

Accordingly, on the 5th of June, the Plaintiffs' *London* agents submitted to the Defendant's *London* agents draft minutes of the suggested order, which minutes so far as material were as follows: "This Court doth by consent order and adjudge that the Defendant, his agents, &c., be perpetually restrained from using in the course of any trade or business carried on by the Defendant the name '*Lewis's*' or '*Lewis*,' or any other name so nearly resembling the Plaintiffs' name of '*Lewis's*' as to be calculated to deceive, &c."

These minutes were disapproved of by the Defendant's solicitors as being too stringent, and on the morning of the 7th of June they were still unsettled. Before the motion came on for hearing, counsel for Plaintiffs and Defendant met and discussed them, and ultimately an order was agreed upon between them, and endorsed on their briefs as follows:—

"By consent perpetual injunction to restrain the Defendant from trading under the style of '*Lewis's*,' and also from using the word '*Lewis's*' in his advertisements, or otherwise, in the course of his trade or business, without prefixing the initials *J. M.*, or the names *James* or *Mossop*, or both. Defendant to pay Plaintiffs' costs of action."

The Plaintiffs' country solicitors, on seeing the proposed order, immediately objected to it, on the ground that it did not carry out the proposals in the letter of the 24th of May, and stopped the drawing up of the order.

Counsel for the Plaintiffs had seen the letter of the 24th of May a few days previously, but it was not before him on the 7th of June, and he had forgotten its existence.

The Plaintiffs now moved as above mentioned for leave to withdraw their consent to the order so made.

Warmington, Q.C., and *Cutler*, for the Plaintiffs:—

Admitting that the consent of counsel was given to the order, we submit that we are within the exception in *Harvey* v. *Croydon Union Rural Sanitary Authority* (1), and are entitled to withdraw

(1) 26 Ch. D. 249.

our consent, as having been given under a mistake, and not in accordance with the agreement of the 24th of May.

Chadwyck Healey, for the Defendant :—

There was no concluded agreement—the offer made by the letter of the 24th of May was not accepted by the Plaintiffs. The matter, therefore, was at large, and counsel were on the 7th of June remitted to their ordinary position, with the implied power of compromising actions on behalf of their clients.

There was no communication to the Defendant to lead him to believe that the Plaintiffs' counsel was exceeding his authority, and that being so, the Court will not upset that compromise: *Matthews* v. *Munster* (1); *In re West Devon Great Consols Mine* (2).

KEKEWICH, J. :—

I regret that this case has come before me, and I regret that I am obliged to allow this application. I regret that the case has come before me, because it is impossible that a discussion of this kind should not do something to affect what is an extremely valuable power which is placed in the hands of counsel of compromising cases. I mean valuable not to them but to the clients. And I regret that I am obliged to allow the application, because, although I ought not to say, with my small knowledge of the case that I am satisfied, I cannot but entertain a strong opinion that the order indorsed on counsel's brief and the judgment consented to is a good settlement of the action.

However, I think that this case falls within the exception mentioned in what must now be treated, as far as the Chancery Division is concerned, as being the leading authority on the subject, viz., *Harvey* v. *Croydon Union Rural Sanitary Authority* (3). From that decision I do not understand the decision in *Matthews* v. *Munster* to depart in the slightest degree. In the last-mentioned case, as was pointed out by all three judges, what they had to consider was a compromise entered into by counsel without any instructions, without any authority other than such instructions

(1) 20 Q. B. D. 141. (2) 38 Ch. D. 51.

(3) 26 Ch. D. 249.

KEKEWICH J.

1890

LEWIS'S v. LEWIS.

and such authority as are implied in the employment of counsel. The compromise in that case was made by counsel in exercise of that authority conferred on him as the advocate of the party to the litigation. The Judges there took care to point out—Lord Justice *Fry* putting it in the clearest terms—that the counsel did not act on instructions as to a compromise. In this case, however, it is reasonably obvious—whether counsel had the letter of the 24th of May before them or not—that they were endeavouring to the best of their ability to give effect to an intention to compromise which had been conceived by the parties themselves or their legal advisers in the country. They did not start fresh, but knowing that the parties wished to compromise, and having some general notions on the subject, they endeavoured to put them into the best form, and I repeat I think they succeeded.

But I do not think it is a case in which it is possible to say that that is necessarily binding on a party who had not assented to those particular terms. I think that in that way it differs entirely from *Matthews* v. *Munster* (1), and it seems to me that the Court would never direct specific performance of an agreement of this kind, to consent to a perpetual injunction or any other form of decree under circumstances which would be an answer to a claim for specific performance if the question in issue was a contract for the purchase or sale of land.

Here I think there was a misunderstanding—whether from want of information or any other cause it is immaterial to inquire. But I think there was a misunderstanding as to the intention of the parties, and so I think I must allow the withdrawal of what is called a consent, but what was a consent given under a misapprehension, which in law is really not a consent at all.

I am by no means satisfied that any good result will come of this application, and I will not deal with the costs of this application now, but reserve them until the motion is disposed of.

The action came on subsequently for trial without pleadings on the 16th of July, when His Lordship held upon the evidence that the Defendant was using the name "*Lewis's*" in such a way

(1) 20 Q. B. D. 141.

as to represent that his business was a branch of the Plaintiffs' business, and that the case fell within the exception in *Turton* v. *Turton* (1), and accordingly granted an injunction to restrain the Defendant from using the word "*Lewis's*" either alone or jointly with any initial, as a trade-name, or in advertisements, show-cases, bills, &c.

Solicitors for Plaintiffs: *Norris, Allens, & Chapman*, agents for *North, Kirk, & Cornett, Liverpool.*

Solicitors for Defendant: *Shaw, Tremellen, & Kirkman*, agents for *Forshaw & Parker, Preston.*

(1) 42 Ch. D. 128.

A. C. E.

C. A.
1890
June 4, 5.

In re SHARP.
RICKETT *v.* SHARP.

[1889 S. 4646]

Will—Construction—Trust for Investment—Railway or other Public Companies—Things ejusdem generis.

A testator directed his trustees to invest the residue of his estate (*inter alia*) "upon the debentures or securities of any railway or other public company carrying on business in any part of the *United Kingdom*." The trustees proposed to invest in the securities of certain companies incorporated under the *Companies Acts*:—

Held, that the companies having been incorporated by public statute, the instruments forming their constitution being accessible to the public, and their shares being transferable to the public, they were public companies within the investment clause; and that the reference to railway companies in the same clause did not restrict the meaning of the words "public companies."

The decision of *Stirling*, J., affirmed.

THIS case came before the Court on an originating summons taken out by the trustees of the will of *William Sharp*, dated the 3rd of November, 1877, for the purpose of taking the opinion of the Court whether they had power to invest part of the money representing the residuary estate, in securities of the following companies: The *Fore Street Warehouses Company, Limited*; the *India Rubber, Gutta Percha, and Telegraph Works Company, Limited*; *Pawson & Co., Limited*; *Carter Paterson & Co., Limited*; the *Hastings and St. Leonards Baths and Aquarium Company, Limited*; the *Salt Union, Limited*; the *Liverpool United Gas Light Company*; the *Debenture Corporation, Limited*; the *Manchester Ship Canal Company*; the *London and St. Katharine's Docks Company*, and the *South Metropolitan Gas Company*, or some and which of them, as being within the meaning of the following words in the investment clause in the testator's will: "Debentures or securities of any railway or other public company carrying on business in any part of the *United Kingdom*;" and that the meaning of the words "public company" in the clause aforesaid might be defined or declared.

The whole clause in the will was as follows:—"I declare that my executors and trustees shall invest the residue of all the said moneys in the names or name or under the legal control of the trustees or trustee for the time being of this my will (hereinafter called my trustees or trustee) in or upon any of the public stocks or funds or Government securities of *Great Britain*, or upon freehold, copyhold, or leasehold securities in *Great Britain* or *Ireland*, or the debentures or securities of any railway or other public company carrying on business in any part of the *United Kingdom*, or in any securities in or upon which trustees are or shall be by law authorized to invest trust moneys, with power to my said trustees or trustee to vary the said investments for any others of the description aforesaid if, as, and when they or he shall think fit."

With respect to the *Liverpool United Gas Light Company*, the *Manchester Ship Canal Company*, the *London and St. Katharine's Docks Company*, and the *South Metropolitan Gas Company*, which were companies incorporated by special Act of Parliament, it was conceded that they were within the investment clause. All the other companies were incorporated under the *Companies Acts*, 1862 to 1886; but the information before the Court with respect to the nature of the *Hastings and St. Leonards Baths and Aquarium Company* was not considered sufficient for the determination of the question so far as regarded that company.

On the 20th of February, 1890, Mr. Justice *Stirling*, before whom the summons was heard, gave his opinion that all the securities named in the summons were such as the trustees were authorized to invest the trust funds in, except the debentures of the *Hastings and St. Leonards Baths and Aquarium Company*, as to which he expressed no opinion. He made no declaration upon the second point, nor did he express any opinion whether the proposed investments were desirable.

From this decision the Defendant, who represented the residuary legatees, appealed.

P. F. Wheeler, for the Appellant:—

The companies proposed by the trustees are not "public companies." A public company is one which is incorporated by

C. A. 1890 *In re* SHARP. RICKETT *v.* SHARP.

a special Act of Parliament or by Royal Charter. Moreover, it is one which is established for some public purpose, such as for a railway or canal or for supplying the public with gas. Some of the companies proposed by the trustees are public in this sense, but not in the other; some are public in no sense at all, but are merely trading companies. But the testator in this case has indicated his intention by saying "any railway or other public company." This shews that he meant companies that are public in the same sense as railway companies are. Railway companies are incorporated by special Acts of Parliament, and that fact in itself gives them greater publicity, and their management is governed by different rules to ordinary joint stock companies. [He referred to *Macintyre* v. *Connell* (1); *Nicholls* v. *Rosewarne* (2); *In re Griffith* (3); *Edwards* v. *Thompson* (4).]

E. Beaumont, for the trustees, was not called on.

COTTON, L.J.:—

The only question we have to decide is, not what is the general meaning of the expression "public company," but whether certain companies are public companies within the investment clause in this particular will. We should be entering upon a very difficult question if we were to attempt to define what is a "public company" either generally or within the terms of this will. But that is not the point here: it is only whether certain specified companies are within the words of the will. It is true that the Court is asked to give the trustees a general direction as to what they are to consider public companies within their powers of investment. But I think Mr. Justice *Stirling* was right in declining to do so. When any particular company is brought before him, he will have to give his opinion on that special case. At the present time I decline to give any general definition of the words "public company"; but I think that the learned judge was right in holding that the particular companies now objected to are public companies within the meaning of the will. They are all companies which owe their existence to the *Companies Act*,

(1) 1 Sim. (N.S.) 225.
(2) 6 C. B. (N.S.) 480.
(3) 12 Ch. D. 655.
(4) 38 L. J. (Ch.) 65.

1862, and the public know what are the rules which regulate such companies. Their memorandums and articles of association are necessarily public documents, and their shares are transferable to the public, subject to the provisions of the articles of association. When companies have all these characteristics it is impossible for us to say that they are not to be considered public companies.

But it is said that it is not so here, because the testator has used words which shew what he meant by a public company. The words are "any railway or other public company," and it is contended that because public companies are referred to in connection with railway companies, and railway companies are usually incorporated by special Acts of Parliament, the testator only refers to companies incorporated by special Acts or by charter. I do not agree with that. If the testator had said that he might have been more prudent; but he has not done so. It is true that he refers to railway companies, but he also adds, "or any other public company carrying on business in any part of the *United Kingdom*"; and I think it would be a wrong interpretation of the will to say that those words, because they follow the reference to railway companies, must be confined to companies similar to them or to companies incorporated in the same way as railway companies are, namely, by special Act of Parliament. Mr. Justice *Stirling* was right in declining to advise the trustees to invest in any of these proposed companies, and only deciding that they were public companies within the true meaning of the investment clause. To prevent our decision being a trap to the trustees, I desire to say that I give no opinion whether an investment in any of these companies is desirable; but only that they come within the words of the will as public companies. The mere fact that they are public companies within the power will not justify the trustees in investing in any of them without full inquiry. They must consider the prospects of each company and all other things which trustees ought to consider. It will, therefore, be best, in order to prevent misapprehension, to add to our order a declaration that the Court expresses no opinion whether it is desirable to invest in the securities of any of these companies. The appeal fails.

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BOWEN, L.J.:—

I am of the same opinion. I do not think the Appellant is entitled to ask us to define generally what is a public company, or what is a public company within the meaning of this will. The only question we have to consider is whether the particular companies named are public companies within the true construction of the clause in the will. That being so, all that we now decide is that these companies, possessing the qualifications which the Lord Justice has stated, are public companies within the clause. It may be that it is not necessary that they should possess all those qualifications in order to be so. I give no opinion on that question.

FRY, L.J.:—

I am of the same opinion. I think it is clear that all these companies are public companies within the clause. They are incorporated by public statute; the instruments which form their constitution are accessible to the public; and their shares are transferable to the public. I do not say that all these things are necessary to constitute a public company; but where they are all present, I think the company is clearly a public company within this investment clause.

Solicitors for Appellant: *Steadman, Van Praagh, & Sims.*
Solicitors for Respondents: *Beaumont & Son.*

M. W.

In re PALMER.

C. A.
1890
NORTH, J.
May 8.
C. A.
June 18.

Solicitor and Client—Mortgage—Agreement as to Costs—Solicitors' Remuneration Act, 1881 (44 & 45 *Vict. c.* 44), *s.* 1 *sub-s.* 3; *s.* 8 *sub-ss.* 1, 4—"*Client*"—*Employment of Solicitor.*

S., being desirous of borrowing money on mortgage, wrote to *P.*, a solicitor, a letter instructing him to raise £300 upon a specified security, and undertaking "to pay your costs (which I agree at £20, exclusive of money out of pocket) to be incurred in and about doing what is necessary for the purpose of these instructions."

P. found a mortgagee and carried out the mortgage, acting on behalf of both the mortgagor and the mortgagee, and retained out of the £300 £20 for costs of both parties, other than out of pocket costs.

S. then applied for an order directing *P.* to deliver a bill of all such fees, charges, and disbursements as he claimed or had deducted, and referring such bill when delivered to taxation:—

Held, first, that *S.*, the mortgagor, was a "client," and had employed *P.* as his solicitor, within the meaning of sect. 1 of the *Solicitors' Remuneration Act*, 1881; secondly, that although the £20 was partly in respect of business in which the solicitor was acting on behalf of the mortgagee, the letter was an agreement for remuneration between client and solicitor within the 8th section of the Act; and thirdly, that in the absence of evidence that the charge of £20 was either unfair or unreasonable it ought not to be referred for taxation.

APPEAL from Mr. Justice *North*.

On the 21st of January, 1884, *Robert Slater*, a journeyman butcher, being desirous of raising £300 on mortgage, wrote to Mr. *W. B. Palmer*, a solicitor, as follows: "I hereby request and instruct you to raise for me the sum of £300 at 10 per cent. per annum on the security of all my estate and interest under the will and in the property of the late *Thomas Symons*, deceased, and I hereby undertake to pay your costs (which I agree at £20, exclusive of money out of pocket) incurred, and to be incurred in and about doing what is necessary in your opinion for the purpose of carrying out these instructions.—*R. Slater*, Jun."

Mr. *Palmer* found a mortgagee, and carried out the mortgage. In so doing he acted both for the mortgagor *Slater*, and for the mortgagee, and on completion, he retained out of the £300 £20 for his costs on behalf of both parties, and £3 11*s.* for money out of pocket, and handed over the balance to *Slater*.

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There were other transactions between *Slater* and Mr. *Palmer*, which do not call for a report; and in January, 1889, *Slater* took out a summons asking (*inter alia*), that Mr. *Palmer* might be ordered to deliver to him "a bill of all such fees, charges, and disbursements as he claimed to be due or paid, or as have been deducted by him from the said Applicant, or out of his moneys," and asking also for a reference to the Taxing Master to tax the said bill when so delivered.

The *Solicitors' Remuneration Act*, 1881, in sect. 1, sub-sect. 3 as to the word "client" enacts as follows:—

"'Client' includes any person who, as a principal, or on behalf of another, or as trustee or executor, or in any other capacity, has power, express or implied, to retain or employ, and retains or employs, or is about to retain or employ, a solicitor, and any person for the time being liable to pay to a solicitor, for his services, any costs, remuneration, charges, expenses, or disbursements."

The same Act in sect. 8, provides as follows:—

"Sub-sect. 1: With respect to any business to which the foregoing provisions of this Act relate" (previously defined to include "business connected with mortgages") . . . . "it shall be competent for a solicitor to make an agreement with his client, and for a client to make an agreement with his solicitor, before or after or in the course of the transaction of any such business, for the remuneration of the solicitor, to such amount and in such manner as the solicitor and the client think fit, either by a gross sum . . . . or otherwise; and it shall be competent for the solicitor to accept from the client, and for the client to give to the solicitor, remuneration accordingly."

"Sub-sect. 4: The agreement may be sued and recovered on or impeached and set aside in the like manner and on the like grounds as an agreement not relating to the remuneration of a solicitor; and if, under any order for taxation of costs, such agreement being relied upon by the solicitor shall be objected to by the client as unfair or unreasonable, the Taxing Master or officer of the Court may inquire into the facts, and certify the same to the Court; and if, upon such certificate, it shall

appear to the Court or Judge that just cause has been shewn either for cancelling the agreement, or for reducing the amount payable under the same, the Court or Judge shall have power to order such cancellation or reduction, and to give all such directions necessary or proper for the purpose of carrying such order into effect, or otherwise consequential thereon, as to the Court or Judge may seem fit."

The summons taken out by *Slater* was adjourned into Court, and was argued before Mr. Justice *North* on the 8th of May, 1890.

Cozens-Hardy, Q.C., and *Farwell*, for *Slater*:—

An agreement can be no bar to the right of a person to have a solicitor's bill of costs taxed, unless the agreement is one authorised by the Act.

The only agreements made lawful by the Act of 1881, sect. 8, sub-sect. 1, are agreements made between the solicitor and his client. The mortgagor, though he be liable to pay the mortgagee his costs, is not the client of the mortgagee's solicitors or a person for the time being liable to pay to the solicitors their costs—that is to say, the applicants did not act as the clients of the Respondent only in signing the agreements, according to the definition of "client" given by sect. 1, sub-sect. 3 of the Act: *Hester* v. *Hester* (1), following *In re Allen* (2), where it was held that a lessee bound to pay costs of a lessor's solicitor was not the client of the lessor's solicitor.

These are agreements that ought to be set aside on the ground of undue pressure and unreasonableness. By sect. 8 sub-sect. 4, if under any order for taxation of costs such agreement is relied upon, and it is objected to as unfair or unreasonable, the agreement may be impeached. The Court will make an order for taxation in order to give the Taxing Master jurisdiction; unless the Court will make an order for taxation for the purpose, the latter part of the section is nugatory.

Dunham, for *Palmer*:—

The agreements were made between "solicitor and client,"

(1) 34 Ch. D. 607. (2) 34 Ch. D. 433.

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within the meaning of the 8th section of the Act. The definition clause is not exhaustive; but, supposing it were exhaustive, there is nothing to prevent a client including in an agreement costs for which he is not primarily liable; but when these agreements are looked at they are not only agreements between the mortgagor and his client, but they amount to a retainer and agreement on behalf of the proposed mortgagee, in case he chooses to adopt them. The mortgagees did adopt these agreements, for they could not otherwise have been carried out.

If an agreement between solicitor and client coming within the Act is to be impeached, it can only be impeached on the same grounds and in the same way as any other agreement, unless for some reason there is an existing order to tax, and it is relied on in taxation. There is no order to tax, and the Court has no jurisdiction to make one simply for the purpose of giving the Master jurisdiction. If the Court were to assume such jurisdiction, it would amount to holding that there was a summary jurisdiction to impeach the agreement in all cases, and the first part of sect. 8 would be nugatory.

Cozens-Hardy, in reply.

NORTH, J.:—

The first point raised upon the agreement is that such an agreement is valid only so far as it is authorised by Act of Parliament; that it must be made between solicitor and client to come within the Act at all. Sect. 8 sub-sect. 1 of the *Solicitors' Remuneration Act*, 1881, enables a client to make an agreement with his solicitor for the remuneration of the solicitor either by a gross sum, or by commission, or by salary, or otherwise. The point raised is that the person who signed the agreement for remuneration by a gross sum was the mortgagor, and the remuneration which was being provided for comprised both mortgagor's and mortgagee's costs, and in respect of the mortgagee's costs the person making the agreement was not the client of the solicitor within the meaning of the Act. The interpretation clause says "'client' includes any person who, as a principal, or on behalf of another, or as trustee or executor, or in any other

capacity, has power, express or implied, to retain or employ, and retains or employs, or is about to retain or employ, a solicitor, and any person for the time being liable to pay to a solicitor, for his services, any costs, remuneration, charges, expenses, or disbursements." It is said that here the mortgagor did not employ the solicitor so far as he acted as mortgagee's solicitor, and that in the next place he was not a person liable to pay the solicitor, because his liability was to refund to the mortgagee what costs the latter had to pay to his solicitor.

I do not take that view. In my opinion the documents amount to an instruction to or retainer of the solicitors to act not only for the mortgagor but for the mortgagee. No doubt what the documents provide for is payment of the costs of both parties, and it is said that the mortgagor had no authority to give instructions for the solicitor to act for the mortgagee. It is quite true the whole thing might have become abortive if the mortgagee had thought fit not to adopt it; but the authority was evidently given on the assumption that the mortgagee would accede to it. And if that state of things did take place, the mortgagee's costs would be included, and I cannot look on that document as anything but an agreement between a solicitor and his client within the meaning of the Act.

In the next place it is said that the applicant has a right to have the costs taxed, notwithstanding the agreement; and for that reliance is placed on sect. 8, sub-sect. 4 of the Act. The first part of that sub-section provides: "The agreement may be sued and recovered on or impeached and set aside in the like manner and on the like grounds as an agreement not relating to the remuneration of a solicitor." If it stopped there it would simply shew that such agreement might be specifically enforced if the subject of specific performance, or, if for a lump sum, might be the subject of an action for a liquidated demand; the Act says that the fact that it is made between solicitor and client is not to make any difference. Then the section goes on not to modify what has gone before, but to add something additional. It says, "If, under any order for taxation of costs, such agreement being relied upon by the solicitor shall be objected to by the client as unfair or unreasonable, the Taxing Master or officer of

C. A. 1890 *In re* PALMER. North, J.

the Court may inquire into the facts, and certify the same to the Court." That does not seem to me to relate to any case except where there is an order for taxation in existence. In the present case there is not any order for taxation, and the matter cannot go before the Taxing Master unless I make an order for that purpose. I do not think the section empowers me to make such an order. It provides for the case where there is a taxation; then if such agreement were set up except for this provision the Taxing Master would have no authority. The matter would be concluded unless power were given to him by this sub-section.

D. P.

C. A.

Slater appealed. The appeal was heard on the 18th of June, 1890.

Farwell (*Cozens-Hardy*, Q.C., with him), for the Appellant:—

The letter which the Appellant wrote to the solicitor is not an agreement within the meaning of the *Solicitors' Remuneration Act*, 1881. The 8th section of that Act empowers a solicitor to do what was previously unlawful, *i.e.*, "to make an agreement with his client" as to the amount and form of his remuneration. But although it is the practice for a mortgagor to pay the costs of his mortgagee, he is not the agent of the mortgagee for the purpose of retaining a solicitor on his behalf, and could not do so; and as he cannot be said to have "power express or implied to retain or employ" a solicitor for the mortgagor, he is not the "client" of the mortgagor's solicitor within the definition contained in s. 1, sub-s. 3 of the Act. Consequently there could be no valid agreement between *Slater* and Mr. *Palmer* as to a sum which included the mortgagor's costs as well as his own.

[FRY, L.J.:—Sub-sect. 3 of sect. 1 is not a definition clause; it merely says that a "client" in that Act "includes," and so on. In other respects it leaves the expression "client" where it was.

COTTON, L.J.:—"Client" means everybody who employs a solicitor.]

Secondly, assuming the agreement to have been valid, then, under the 4th sub-section of sect. 8, if under any taxation of

costs the agreement "relied upon by the solicitor shall be objected to by the client as unfair or unreasonable the Taxing Master may inquire into the facts." So that the existence of such an agreement does not prevent taxation, and if it is unfair or unreasonable, it may be referred to the Taxing Master, and the agreement may be "impeached and set aside," or the amount agreed upon may be reduced: *In re Gray* (1); *In re Inderwick* (2). The agreement here is clearly unreasonable, for according to the scale the charges should have been less than half the amount agreed; and there should be a reference to the Taxing-Master to tax these costs, accompanied by directions that in taxing them he should have regard to the agreement: *In re Park* (3). The Court has jurisdiction over its own officer, and agreements entered into by solicitors with clients in humble life, who are practically at their mercy, will be jealously looked at by the Court.

Dunham, for Mr. *Palmer*, was not called upon.

COTTON, L.J.:—

Two points have been raised, and very ingeniously argued, but, in my opinion, neither of them can succeed.

First, it has been said that this was not an agreement within the *Solicitors' Remuneration Act*, 1881, on the ground that Mr. *Palmer* and Mr. *Slater* did not stand in the relation of solicitor and client. I think the construction of the third sub-division of the 1st section of the Act is against that contention. According to the definition contained in that sub-section, "client" includes any person who has power express or implied to retain or employ and retains or employs a solicitor. To my mind, Mr. *Slater* had the power to retain or employ Mr. *Palmer*, and has clearly done so. It is very true the remuneration which Mr. *Palmer* has retained was partly in respect of matters in which, strictly speaking, he was not engaged as solicitor for Mr. *Slater*, but he was engaged to do business for him as solicitor; and, in my opinion, the relation of solicitor and client was created between him and Mr. *Slater* within the meaning of this clause.

(1) 30 Sol. J. 551. (2) 25 Ch. D. 279, 282.
(3) 41 Ch. D. 326.

C. A. 1890 *In re* PALMER. Cotton, L.J.

Then it is said that, having regard to the 4th sub-section of the 8th section, this agreement ought to be referred to the Taxing Master. But the Appellant has not brought forward any evidence shewing that this charge is unfair or unreasonable; and although the 4th sub-section does, in my opinion, give the Court power, where an agreement is so impeached, to refer it to the Taxing Master to consider whether the charge is fair and reasonable, no foundation for such an order has been made. Mr. *Farwell* has argued that this is a very unreasonable charge; but I do not think that he says it is unfair. I consider, however, that the Court ought not, merely upon such an argument by counsel, unsupported by affidavit or facts which will lead to that conclusion, to refer such an agreement to the Taxing Master to exercise the power given by the 4th sub-division of the eighth section.

In my opinion the appeal fails.

BOWEN, L.J.:—

I am of the same opinion, and I agree entirely with what the Lord Justice has said.

FRY, L.J.:—

I am of the same opinion.

Solicitors: *G. B. Crook; W. B. Palmer.*

W. W. K.

In re RAWLINS' TRUSTS.

C. A. 1890 June 20, 21.

Will—Construction—Gift of Income to Wife—Absolute Interest—Life Estate—Gift over—Death "without leaving Children"—Implied Gift to Children—Residuary Gift.

Where, in a will, there is a gift to *A.* for life, with a gift over "on the death of *A.* without leaving children," those words are not, by themselves, without assistance from other parts of the will, sufficient to create a gift by implication to the children.

A testator gave his real and residuary personal estate to his wife and his nephews *S.* and *W.* upon trust for his wife during her life; and after her death he gave his real estate to his brother during his life, with remainder, as to three freehold houses, to his (the testator's) nephews *S.* and *W.*, upon trust to pay the rents and interest to his niece during her life for her separate use; and after the decease of his said niece, "she leaving no child or children," the testator gave one of the three freehold houses to his nephew *S.*, and the other two to his nephew *W.* And after bequeathing certain legacies, which he directed should be paid out of any residue there might be left, or, if none, then out of the rents of the real estate, the testator gave the residue of his real and personal estate to his nephews *S.* and *W.* equally. The testator's niece survived his wife and brother, and died leaving two children:—

Held, by *Kay*, J., that the niece took an absolute interest in fee simple in the three houses; but *held*, on appeal, that she took a life interest only; and that, on her death, the houses passed under the ultimate residuary gift to the two nephews equally, there being no implied gift to the children of the niece.

The rules of construction laid down in *Kinsella* v. *Caffrey* (1), as to implied gifts to children, approved of.

WILLIAM WALLER RAWLINS the elder, by his will dated the 11th of May, 1844, after directing the payment of his debts, funeral and testamentary expenses, and giving the use of his furniture to his wife during her life, and after her decease to his nephew, *William Waller Rawlins*, proceeded: "And as to all my real estate and all other my personal estate, of what nature or kind soever and wheresoever which I now have, or which I may be interested in or entitled unto at the time of my decease, I give, devise, and bequeath the same and every part thereof unto my said wife, my nephew, *Samuel George Rawlins*, and my said nephew, *William Waller Rawlins*, upon trust to permit and suffer

(1) 11 Ir. Ch. Rep. 154, 162.

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my said wife to receive the rents, issues, dividends, and profits thereof during her life, and from and after the decease of my said wife I give and devise my real estate, and I give and bequeath my personal estate not hereinbefore specifically bequeathed, in manner hereafter mentioned, that is to say, to my brother, *George Rawlins*, the whole of my real estate during his life."

Then, after a gift to his nephew, *Samuel George Rawlins*, of certain freehold houses in *Bethnal Green*, *Middlesex*, and a freehold house in *Houndsditch*, and a sum of £850 due on mortgage, and also a gift to his nephew, *William Waller Rawlins*, of a copyhold house in the manor of *Kennington*, and a freehold house in *Peckham Lane*, *Surrey*, and a debt of £360 5*s*., and also certain furniture, the testator proceeded: "I give, devise, and bequeath my freehold house in *Stamford Street*, *Blackfriars Road*, my freehold house, No. 85, *Cannon Street*, in the city of *London*, and my freehold house, No. 19, *Coppice Row*, *Clerkenwell*, unto the said *Samuel George Rawlins* and *William Waller Rawlins*, upon trust to pay the rents and interest thereof unto my niece, *Harriet Rawlins*, for and during her natural life, for her sole, separate, and peculiar use and benefit, and without being in anywise subject or liable to the debts, control, or interference of any husband with whom she may intermarry, and her receipts, whether she shall be single or married, shall be good and effectual releases and discharges for the same. And after the decease of my said niece, *Harriet Rawlins*, she leaving no child or children, I give, devise, and bequeath my freehold house in *Stamford Street*, *Blackfriars*, to my nephew, *Samuel George Rawlins*, and I give, devise, and bequeath my freehold house, No. 85, *Cannon Street*, City, to my nephew, *William Waller Rawlins*, and my freehold house, 19, *Coppice Row*, *Clerkenwell*." Then, after bequeathing certain legacies, which he directed should be paid out of any residue there might be left, or, if none, then out of the rents of the real estate, the testator proceeded: "And as to the rest, residue, and remainder of my real or personal estate, of what nature or kind soever and wheresoever, which I now have, or which I may be possessed of or entitled to at the time of my decease, I give, devise, and bequeath the same unto the said *Samuel George Rawlins* and

William Waller Rawlins, equally divided between them, share and share alike." And the testator appointed the said *Samuel George Rawlins* and *William Waller Rawlins* his executors.

The testator died on the 4th of December, 1845, his widow on the 12th of February, 1853, and his brother, *George Rawlins*, on the 9th of February, 1850.

The testator's niece, *Harriet Rawlins*, named in the will, married *Joseph Read Spencer*, by whom she had two children only, a daughter, *Julia Josephine*, who married *Bernard Scalé*, and a son, *Aubrey Spencer*.

Under an order made in 1866, under the *Settled Estates Acts*, the freehold house, No. 85, *Cannon Street*, was sold, and the purchase-money, £8250, was paid into Court, being now represented by £9088 8*s.* 7*d.* New Consols. By another order, made in 1876, the dividends on the fund in Court were ordered to be paid to the mortgagees of *Harriet Spencer's* life interest.

Harriet Spencer died on the 17th of December, 1889, leaving her said two children, *Julia Josephine Scalé*, and *Aubrey Spencer*, who was her heir-at-law, surviving her. She left two wills, one made in 1883 and the other in 1884, but neither had yet been admitted to probate, there being litigation pending in the Probate Division respecting them. By the will of 1883, *Harriet Spencer* purported to dispose of her property for the benefit of both her children, but by the will of 1884 she gave all her property to her son, *Aubrey Spencer*, excluding her daughter, Mrs. *Scalé*, altogether.

Samuel George Rawlins, one of the testator's nephews, died in 1867, having by his will devised all his real and personal estate to trustees upon the trusts therein mentioned.

William Waller Rawlins, the testator's other nephew, died in 1881, having by his will devised and bequeathed all his real and personal estate unto and to the use of trustees upon the trusts therein mentioned; and this was a petition by those trustees, praying a declaration that, according to the true construction of the will of *William Waller Rawlins* the elder, the house No. 85, *Cannon Street*, or the fund in Court representing the same, became vested in his nephew, *William Waller Rawlins*, and that the petitioners,

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as representing him, were now absolutely entitled to the fund in Court; or, in the alternative, that the said house became part of the residuary estate of *William Waller Rawlins* the elder, and passed by the residuary devise; or that the true construction of his will, and the rights and interests of the persons respectively entitled to the fund in Court, might be ascertained and declared.

Harriet Spencer's two children claimed that, in the event which had happened, of her dying leaving children surviving her, they, as such children, had become absolutely entitled to the three freehold houses devised by the will of *William Waller Rawlins* the elder upon trust for *Harriet Spencer* for life, and were therefore entitled to the whole of the funds in Court representing No. 85, *Cannon Street.*

The petition was heard by *Kay*, J., who held, upon the construction of the will, that *Harriet Rawlins* took an absolute interest in fee simple in the house No. 85, *Cannon Street*, and made a declaration to that effect, but ordered the rest of the petition, as to the distribution of the fund, to stand over, it being stated that there were incumbrances upon the various interests in the fund, which might necessitate inquiries.

The point decided, namely, that *Harriet Rawlins* took an absolute interest in fee simple, was not suggested in the petition, and was raised by the learned Judge himself when the petition came on for argument.

From that decision one of the respondents, the surviving trustee and executor of *Samuel George Rawlins*, appealed, the appellant claiming to be entitled, under the ultimate residuary gift, to a moiety of the fund representing the house No. 85, *Cannon Street.* The parties entitled to the other moiety—the petitioners—did not appeal.

The appeal came on for hearing on the 6th of June, 1890, but, on being opened, it was ordered to stand over, that the persons interested under the two wills of *Harriet Rawlins* might be brought before the Court, and be bound; it being stated that, in case the decision of *Kay*, J., was reversed, there would be no reason for continuing the probate litigation, as she left no other property.

The executors of the two wills having been served, the appeal was heard on the 20th and 21st of June, 1890.

The only question calling for a report at any length was whether, assuming *Harriet Spencer* took a life estate only, there was an implied gift over to her children.

Robinson, Q.C., and *Rolt*, for the appellant:—

The question raised in the Court below was whether there was an implied gift to the children of *Harriet Rawlins*. The learned Judge himself took the point that she took an absolute interest. We submit that this construction is wholly untenable, and cannot be supported, having regard to the words of the trust for *Harriet Rawlins*, which are the common and natural words for giving a woman an estate for life to her separate use. Then, if she took only an estate for life, as we submit she did, can a gift over to her children be implied from the words, "after the decease of my said niece, *Harriet Rawlins*, she leaving no child or children"? We submit that no such gift over can be implied, and that therefore, on *Harriet Rawlins*' death, the house, No. 85, *Cannon Street*, fell into the ultimate residue: *Dowling* v. *Dowling* (1); *Ranelagh* v. *Ranelagh* (2); *Lee* v. *Busk* (3); *Cooper* v. *Pitcher* (4); *Neighbour* v. *Thurlow* (5); *Re Hayton's Trusts* (6); *Theobald* on Wills (7).

The contrary decision of *Ex parte Rogers* (8) has been gravely doubted, both in *Lee* v. *Busk* and *Neighbour* v. *Thurlow*. This case falls within the second rule laid down in *Kinsella* v. *Caffrey* (9).

Marten, Q.C., and *Warrington*, for *Aubrey Spencer*, and for the executor of *Harriet Spencer's* second will:—

We support the judgment of the Court below, and contend, first, that *Harriet Spencer* took an absolute estate in fee and if not, then, secondly, that on her death there was an implied gift to her children. Upon the first point, we submit that the trust or direction to pay the rents to her carries the fee:

(1) Law Rep. 1 Ch. 612.
(2) 12 Beav. 200.
(3) 2 D. M. & G. 810.
(4) 16 L. J. (Ch.) 24.
(5) 28 Beav. 33.
(6) 4 N. R. 55.
(7) 3rd Ed. p. 525.
(8) 2 Madd. 449.
(9) 11 Ir. Ch. Rep. 154, 162.

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Blann v. *Bell* (1); *Metcalfe* v. *Hutchinson* (2); *Abbott* v. *Middleton* (3); *Grey* v. *Pearson* (4); *Cropton* v. *Davies* (5); *Newland* v. *Shephard* (6). Upon the second point, the inference from the words of the will is that the testator intended that the children of his niece, if she had any, should take; otherwise there would be this absurd result, that if there were no children, the nephews would take in certain proportions, while, if there were children, the same persons would take in different proportions. It is impossible to attribute to the testator such an eccentric intention.

Renshaw, Q.C., and *Dunning*, for Mrs. *Scalé*, contended that *Harriet Spencer's* children took absolute interests by implication: *Jarman* on Wills (7).

Cutler, Q.C., and *K. G. Metcalfe*, for the executors of *Harriet Spencer's* first will, contended that she took an absolute estate in fee: *Cropton* v. *Davies* (8); *Watkins* v. *Weston* (9); *Newland* v. *Shephard* (10): *Wilks* v. *Williams* (11).

Horace E. Miller, for an incumbrancer of *Aubrey Spencer's* interest.

Upjohn appeared for the Petitioners, but took no part in the argument.

COTTON, L.J. (after reading the will, came to the conclusion that *Harriet Spencer* took a life interest only, and not an absolute interest in fee. His Lordship proceeded):—

Then we come to the question whether there is an implied gift to the children arising from these words: "and after the decease of my said niece, *Harriet Rawlins*, she leaving no child or children." It is said that those words imply a gift to the children. The law seems to be this, that where there is a life interest given to a person and then a gift over, if that person dies without leaving children, the gift over alone will not give

(1) 2 D. M. & G. 775, 780, 781.
(2) 1 Ch. D. 591.
(3) 7 H. L. C. 68, 89.
(4) 6 H. L. C. 61.
(5) Law Rep. 4 C. P. 159, 167.
(6) 2 P. Wms. 194.
(7) 4th Ed. vol. i. pp. 540, 563, 564.
(8) Law Rep. 4 C. P. 159, 165.
(9) 3 D. J. & S. 434.
(10) 2 P. Wms. 194.
(11) 2 J. & H. 125.

the children any interest whatever. I quite agree that the rule of law is, that the Court will look at other parts of the will in order to ascertain whether there is an implied gift to the children by reference to such words; but, to my mind, the rule is well established by numerous decisions that, where those words occur simply alone, they will not imply or justify the Court in implying, any gift to the children. In this case I can see nothing from which we can imply from other parts of the will a gift to the children, or which would justify us in implying from those words a gift to the children.

Then it is said you ought to imply a gift to the children from this—that there is a residuary gift which deals with the property in question in a way somewhat different from that in which the testator deals with it in the event of his niece leaving no children. To my mind that is not sufficient. I do not think that we ought to deal with a residuary gift as containing in it all the events that have happened which are said to bring the property into the residuary gift. The residuary gift is, in my opinion, that which is put into the will by the testator in order to catch up everything and prevent an intestacy occurring as regards anything that may not have been affected and disposed of by the previous part of the will; and we ought not to say that, in the events which have happened, there is such an absurdity here, having regard to the residuary gift and the other gifts in the will, as that we cannot give the true construction to the words which have been used by the testator. In my opinion, therefore, the children took no interest at all. That being so, the Appellant must succeed, because the residuary legatees will take this property.

Then it is said that only one of the residuary legatees is appealing. Probably the other residuary legatee was a little afraid of the costs, and did not take so bold a view of the law as the residuary legatee who has appealed. But, in my opinion, in construing the will we cannot put a different construction upon that portion of the will as regards the residuary legatee who has not appealed. In my opinion we ought to declare that, in the events which have happened, the house in question has fallen into the residuary bequest.

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Bowen, L.J. (after stating that he concurred in the view that *Harriet Spencer* took only a life estate, proceeded):—

Then the second point is, as to the children. The question is, is it possible that any gift to the children is to be implied from these words, "and after the decease of my said niece, *Harriet Rawlins*, she leaving no child or children, I give, devise and bequeath my freehold house," and so on? It is said that you are to read into the words, "after the decease of my said niece, *Harriet Rawlins*, she leaving no child or children," a gift, in the event of her having a child or children, to such child or children. Now the rule of construction to be adopted is clear. Many cases may approach one side of the line, and many cases may approach it on the other, and it is clearly immaterial and unnecessary on the present occasion to go into all the cases in order to measure the distance by which each is divided from the central line of interpretation: the rule or canon of interpretation is all that we have to do with. That rule is laid down—and I take it because it seems to be the effect of the authorities, so far as the principle of construction is concerned—in the case of *Kinsella* v. *Caffrey* (1). In that case the Master of the Rolls in Ireland said this (2): "I apprehend, therefore, that the authorities may be classed under three heads: first; where there is an indefinite bequest to the parent, and, if he die without having or leaving children, to *B.* In that case, it is clear that the children do not take any interest by implication. Secondly; if there is a bequest to the parent for life, and, if he die without having or leaving children, to *B.*; if the parent dies leaving children, they are not entitled by implication. Thirdly, if, however, in a case such as I have last mentioned, there are matters on the face of the will to raise an inference in favour of the children, the Court is at liberty to consider these circumstances in connection with the bequest over, in the event of the parent dying without having or leaving children, although such bequest over, by itself, is not sufficient to justify the Court inferring a gift in favour of the children."

Taking that to be the rule, and neglecting all the discussion of the various authorities with the view of seeing whether they have been correctly decided as falling on one side of the line or

(1) 11 Ir. Ch. Rep. 154. (2) 11 Ir. Ch. Rep. 162.

the other, which may be an interesting question in each particular case, although it only concerns the parties in that case who have long since passed away—coming back to this rule, it seems to me that we have only to consider whether on this will there are other matters disclosed on the face of it which ought to lead us to infer a gift to the children from words which in themselves, and without such matters of contextual importance, would not be sufficient to justify us in assuming that such a gift to the children was intended. Like the Lord Justice, I have scanned this case carefully with a desire if possible to do justice to the argument which has been presented to us; but it seems to me that the indications afforded by the rest of the will are not sufficient to enable us to say that there is an implied gift in favour of the children without departing from the field of reasoning and entering on the field of conjecture and speculation. That is the point at which one must pause, because one has no right to make a will for the testator by conjecture. I therefore pause there. I do not think it is true to say that the testator must always be assumed to contemplate all the events upon which the residuary clause in the will comes into operation. All he does is to provide the clause in order that it may gather up all the property in case of any contingencies which he has enumerated, or any contingencies which he may have overlooked. Nor would it be true to say, as Mr. *Marten* contended, that it is to be presumed that the testator did know what the true construction of his will was. He no doubt knew what he intended; but what he has said is a matter for construction by the Court. The true construction to be put upon the will by the Court depends on whether he has used language which is adequate to express his intention, and that is a matter on which the testator is not necessarily the best judge at all.

On the whole, with some regret—because one always regrets a decision which deals with a will on the ground that the testator's meaning is not sufficiently expressed, although it may still be that, if we are to enter into the region of surmise, we may well surmise that he intended that which the Court says it cannot assume—with a regret of that kind, and a regret of that kind only, I think the learned Judge below went too far in his attempt to carry out what he presumed—without, as far as I

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see, sufficient justification by the will—to be the intention of the testator.

FRY, L.J. (after reading the will, and stating that he disagreed with the construction arrived at in the Court below, and that, in his opinion, the testator's niece took only a life interest, proceeded):—

As I have already observed, I cannot find in the terms of the disposition any indication of anything more than a life interest in *Harriet*. But then, when I look at the other portions of the will, I find myself equally unable to find anything from which I ought to enlarge the express life interest into an estate in fee. That being so, there arises the second question, whether the Court can infer a gift to the child or children of *Harriet* by reason of the gift over being in the event of her dying "leaving no child or children." The rule of law appears to me to be plain, and I adopt the statement of it which has been read from the judgment of the Master of the Rolls in *Ireland*.

Then the inquiry comes to be this: Is there anything in the will, beyond the mere fact of the gift over being in the event of the niece leaving no child or children, which shows the intention that the child or children shall take? The only thing which has been or can be relied upon is this: It is said that the gifts over are so inconsistent and absurd that it is impossible for the Court to allow them to take effect. It is said the terms of the gifts over are to this effect: first, in the event of the niece dying leaving no child or children, then one house goes to the one nephew and two other houses to the other nephew; and, secondly, in the event of the niece leaving children, then all three houses go to the two nephews equally as tenants in common. That, no doubt, seems to be a somewhat eccentric disposition; but I think it is explained by the general scope of the will. The testator is anxious, wherever he contemplates a particular gift taking effect, to determine which house is to be taken and which left, or which mortgage is to be taken and which left; and it is only as a last resort, where he is sweeping up everything into the residuary bequest, that he gives the residue to the two nephews as tenants in common. That may be an unwise or a silly mode of proceeding, but it is one which is intelligible. The testator likes th e

idea of disposing of his property in particular parts, and not in undivided shares; and it is only when he has exhausted the whole of the series of particular dispositions that he gives the residue. Therefore, I am unable to find in that anything which ought to lead me to infer that the children are to take in the event of there being such an apportionment.

Now I will only make one further observation, and that is with regard to the authorities. It appears to me that the authorities clearly show that the mere fact that the gift over deals with the event of there being no child cannot raise by itself any implication that if there are children they are to take; and that this line of authorities goes back earlier than any case to which our attention has been called. In the case of *Greene* v. *Ward* (1), decided by the Master of the Rolls in the year 1826, he states the proposition of law to be this (2): "If a sum of money is bequeathed to *A. B.* for life, and, if he dies leaving no issue, then to another, that does not raise any implication in favour of the issue of *A. B.*; though, if he dies leaving issue, the gift over does not take effect." It appears from a statement in the case of *Ranelagh* v. *Ranelagh* (3) that the decision of the Master of the Rolls in *Greene* v. *Ward* was affirmed by Lord *Lyndhurst* on appeal. Whether that particular proposition was affirmed or not I know not; but *Greene* v. *Ward* has been cited and has been considered as an authority from the year 1826 down to the present time. Therefore I think, as to the general proposition of law, no implication of a gift to children can be raised in this case. Then I have looked to see whether there are any circumstances from which I can infer that children are to take beyond the mere gift over, and I can find none.

Their Lordships accordingly discharged the order of *Kay*, J., and made a declaration that, upon the death of *Harriet Spencer*, the house No. 85, *Cannon Street*, passed under the residuary devise; and they ordered a distribution of the fund in Court upon that footing.

Solicitors: *Moon & Gilks; A. Scott Lawson; Law & Worssam; Gasquet & Metcalfe; Dangerfield & Blythe.*

(1) 1 Russ. 262. (2) 1 Russ. 265.
(3) 2 My. & K. 446.

G. I. F. C.

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CHITTY, J.
April 18.
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June 30;
July 1.

In re HEAD'S TRUSTEES AND MACDONALD.

[1890 H. 412.]

Will—Charge of Debts—Authority as distinct from Direction to Pay—Substitution by Vendors of a New Title.

A testator devised and bequeathed his real and personal estate to trustees upon trust to pay the rents of the real estate and the income of the personal estate to his wife for life, and after her death to sell and convert, and to divide the proceeds among his children. He then proceeded to "authorize" his trustees or trustee to "adjust and pay all claims made upon my estate, and generally to act in the premises as my said trustees or trustee shall in their or his discretion think fit." He appointed his trustees executors of his will:—

Held, that this authority did not, like a direction to pay debts, make it the duty of the trustees to pay debts out of whatever property of the testator was vested in them, and did not charge the debts on the real estate, and that the trustees therefore had not during the life of the widow any power to sell the real estate.

The trustees, in December, 1889, entered into a contract to sell which was to be completed by the 24th of January, 1890. The purchaser took the objection, that during the life of the widow the trustees could not sell. On the 6th of January the vendors' solicitor wrote contending that the trust for sale could be accelerated by a surrender of the life estate. On the following day the purchaser's solicitor wrote repudiating the contract, and asking for a return of the deposit. Nothing more took place till the 29th of January, when the vendors' solicitor wrote to say that a good title could be made by the concurrence of the beneficiaries, which the vendors would procure:—

Held, that the purchaser was entitled to be relieved from his contract, the concurrence of the beneficiaries not being offered till after the time for completion had expired, and long after the repudiation by the purchaser.

Whether, if the vendors had at once, when this objection to the title was taken, offered the concurrence of the beneficiaries, shewn that they could and would concur, and given an opportunity of investigating their title, they might not have forced the purchaser to take the title, *quære*.

W. H. HEAD, by will made in 1871, devised his real estate and bequeathed his residuary personal estate to *P. Head* and *J. Walker*, upon trust to let or sell his business as a builder, and as to his real estate to receive the rents and pay the same with the income of his personal estate to his wife for her life, and after her death to sell the real estate and such parts of his personal estate as should not consist of money, and to invest the net

proceeds for the benefit of his children as therein mentioned. "And I hereby authorize my said trustees or trustee to release or compound any debts owing to me or my estate, or to give time for payment, or to take such security for payment, and to adjust and pay all claims made upon my estate, and generally to act in the premises as my said trustees or trustee shall in their or his discretion think fit." At the end of his will the testator appointed *P. Head* and *J. Walker* his executors.

The testator died in November, 1889, and his personal estate was found utterly insufficient for payment of his debts. The trustees, on the 17th of December, 1889, put up the testator's freehold property for sale in lots, subject to conditions which provided that purchases should be completed on or before the 24th of January, 1890. *Macdonald* at the sale bought two of the lots and paid a deposit. On the 22nd of December the abstract was delivered. The purchaser's solicitor asked whether the widow was living, and the vendors' solicitors replied that she was living and would join in the conveyance. The purchaser's solicitor rejoined, that as she was living the trust for sale had not arisen, and the trustees could not sell. On the 6th of January, 1890, the vendors' solicitor wrote contending that the trust for sale could be accelerated by the widow's surrendering her life estate. On the 7th of January the purchaser's solicitor wrote to repudiate the contract on the ground that a good title could not be made, and asked for a return of the deposit. Nothing further took place till the 29th of January, when the vendors' solicitor wrote saying that the vendors were advised that a good title could be made by the beneficiaries joining in the conveyance, and that the vendors would procure their concurrence. The purchaser declined to proceed further with the purchase, and on the 4th of February took out a summons under the *Vendor and Purchaser Act*, 1874, for a declaration that a good title had not been shewn, for payment of the costs of investigating the title, and for a return of the deposit. Mr. Justice *Chitty* made in Chambers an order as asked by the summons, and the vendors moved to discharge that order.

The motion was heard before Mr. Justice *Chitty* on the 18th of April, 1890.

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O. L. Clare, for the motion:—

The question is whether there is an implied power of sale under the terms of this will. I submit there is. The will contains an authority to pay debts and compromise, and the only way in which this can be done is by selling the estate. A general direction to pay debts gives the executors a power of sale; the word here is "authorize." Does that make any difference? I submit not; inasmuch as the debts cannot be paid without selling the estate, you must imply an authority to do all that is necessary. There is no decision directly in point.

[CHITTY, J.:—The question is, whether the testator ever contemplated that it would be necessary to sell his real estate for payment of his debts. There is a great difference between directing trustees or executors to pay debts and saying they may do so. In this case, too, he does direct his trustees to sell the estate after the death of his wife.]

The clause in this will is similar in terms to sect. 37 of the *Conveyancing and Law of Property Act*, 1881, under which, if trustees and executors can do all that is necessary or expedient, surely they must have power to sell.

Sefton Strickland, for the Respondent, was not called upon.

CHITTY, J.:—

It is admitted by Mr. *Clare* that he can find no authority that justifies his proposition that the clause in this will implies a power of sale; but his argument is that an authority to pay debts and compromise claims ought to give a power of sale, because in this case it is the only way in which this can be done. I should be going a long way beyond the authority given by this testator, and beyond the principles on which such authority is given, if I were to accede to this argument. A mere authority to pay debts does not give the executors a right to burden the land of the testator with their payment. In most wills now there is either an express or statutory power given to executors and trustees to compound debts and compromise claims; and I must take care of other testators too, or I may give grounds for an argument that a

mere power to compound gives trustees and executors a power of sale. [His Lordship then read the clause and stated the will, and continued :—] In my opinion, I have no right to accelerate the express trust for sale after the death of the wife, and I should be misconstruing this will if I held that the testator here intended by this clause to authorize his executors and trustees to sell. Whether such an authority ought to be implied in sect. 37 of the *Conveyancing and Law of Property Act*, 1881, as argued by Mr. *Clare*, is not for me to say. The result is that I must refuse this motion with costs.

W. C. D.

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The vendors appealed. The appeal came on for hearing on the 30th of June, 1890.

Cozens-Hardy, Q.C., and *Clare*, for the vendors :—

We submit that the testator has charged his real estate with his debts, and that the executors, therefore, can sell under 22 & 23 Vict. c. 35. If he had said, "I direct my trustees or trustee to pay all claims made upon my estate," there could have been no doubt that the debts were charged. What he has said is, "I authorize." There is no authority in point; but we contend that an authorization has the same effect as a direction. Then we offer the concurrence of the beneficiaries, who are all adult and *sui juris*, so that a good title can be made, even if there is not an effective power of sale.

Romer, Q.C., and *Sefton Strickland*, for the purchaser :—

It would be very serious to hold that a clause like this charges a testator's debts on his real estate. The object of the clause was merely to give to the trustees the powers now given to trustees and executors by the *Conveyancing and Law of Property Act*, 1881, sect. 37, sub-sect. 2, which was not in force when this will was made. The Courts used to be most anxious to imply a charge of debts, as otherwise simple contract creditors could not get paid out of real estate ; but in the present state of the law there is not the same reason for straining words to make a charge. This is a mere clause for enabling the trustees in the management of the real estate to adjudicate upon doubtful

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claims. The testator does not use the word "debts," and even if there had been a positive direction instead of a mere authority, a general charge of debts could not be worked out of these words.

As to the second point, when we objected to the title, an offer was made for the widow to surrender her life estate in order to accelerate the trust for sale. That offer was declined, as the trust for sale could not thus be accelerated. The vendors then not being able to convey, nor to enforce the concurrence of the beneficiaries, the purchaser was not bound to wait to see whether that concurrence could be obtained: *Forrer* v. *Nash* (1). Moreover, there was no offer to procure that concurrence till after the time for completion had expired, and the contract had been repudiated three weeks: *Brewer* v. *Broadwood* (2) shews that in such a case specific performance cannot be decreed. The vendors cannot compel the purchaser to take a title of an entirely different character from that which they agreed to give him: *In re Bryant and Barningham's Contract* (3).

Cozens-Hardy, in reply:—

[FRY, L.J. Will a charge of debts give an immediate power of sale when the will gives an express power of sale arising at a later period?]

It has been decided that it will: *Shaw* v. *Borrer* (4); *Gosling* v. *Carter* (5). As to the word "authorize" an analogy is furnished by *Brown* v. *Higgs* (6), where giving a power was held to create a trust for the objects in default of appointment.

COTTON, L.J.:—

In this case Mr. Justice *Chitty* has decided that the vendors cannot make a good title. Their power to make it is rested upon two grounds. First, it is said there is a charge of debts on the real estate, and that gives them a power to sell. Now, is there a charge? There is no direction here to the trustees to pay the debts, but a power is given to them "to adjust and pay all claims

(1) 35 Beav. 167.
(2) 22 Ch. D. 105.
(3) 44 Ch. D. 218.
(4) 1 Keen, 559.
(5) 1 Coll. 644.
(6) 4 Ves. 708, 718.

made upon my estate." There is no case in which mere authority to pay has been held to create a charge upon real estate, and I think it would be wrong to hold that the present authority does so. In my opinion, this authority has not been given to the trustees for the purpose of bringing in something to pay debts which they could not otherwise apply to that purpose, but in order to enable them to decide what are to be recognised as debts, "to adjust and pay all claims made upon my estate"—that is, if there is some claim as to which it is doubtful whether it can be established as a debt they may adjust it, and may recognise that as a debt when without this authority they could not do so. But that, in my mind, does not add to the property which they can apply in payment of debts.

If that is the true view of the construction of the will, I need not go through the authorities. Where a testator directs his debts to be paid, there it becomes an imperative duty imposed on the trustees to pay them; but there is nothing of the kind here. There is only an authority given to them to recognise and decide what shall be considered as debts payable out of the estate, and then they may pay them out of any funds they have in their hands applicable to the payment of debts. In my opinion, therefore, the vendors fail on the first point, and we must hold that they have not themselves power to make a good title. An objection on this ground was taken by the solicitor of the purchasers, and then after that was done the vendors said: "We are advised we can make a good title if those who are beneficially entitled will concur." Those who are beneficially entitled are the children of the testator, and it is not even now ascertained that they are willing to concur. But suppose they are, there is this difficulty—and, to my mind, it is a great difficulty—that the title would then not be the title of the vendors, but the title of the children. The case of *Bryant and Barningham's Contract* (1) is somewhat in point, where the vendor could not make a good title, and proposed that the tenant for life should convey the estate under the *Settled Land Act*. The Court of Appeal decided against the vendors upon this ground, that it would be forcing upon the purchaser a different title to that which he agreed to

(1) 44 Ch. D. 218.

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take. And so it would be here. Even if all these children should ultimately prove to be in a position to concur and to convey their title, that would be a very different thing from what the purchaser had agreed to take.

In my opinion the decision was right, and the appeal fails.

FRY, L.J.:—

The testator in this case creates first a life interest in his wife, and, after her death, directs the property to be sold and distributed amongst his children, and then he authorizes his trustees to release or compound any debt owing to him or to his estate, or to give time for payment, or to take security for payment, and to adjust and pay all claims made upon his estate, and generally to act in the premises as the trustees or trustee should in their or his discretion think fit.

It is obvious that in its general scope that clause is what is sometimes described as a management clause. The general object is to authorize and to facilitate the action of the trustees in the management and winding-up of the estate. The question we have to consider is whether these words, authorizing his trustees to pay all claims made upon his estate, amount to a charge upon his real estate. I have come to the conclusion that they do not constitute such a charge, that their true object is to authorize the trustees to determine what claims ought to be paid, and to enable them to pay claims, though perhaps there may be no legal evidence of them, out of the fund which by law was applicable to the payment of such claims. Therefore, I think if a claim had been made on the real estate, they might have paid that claim out of the realty, and a claim made upon the personal estate they might have paid out of the personal estate. I cannot find in this clause any intention to enlarge the funds out of which debts were to be paid, and therefore I think that we should be doing wrong if we held that this amounted to a charge of the debts on the realty. It is not unworthy of observation that no case can be produced, although cases of this description are very numerous, in which a mere authority of this description has been held to create a charge. So much for the first point.

The objection having been taken to the title, the vendors said that they would obtain the concurrence of the beneficiaries. Now, if that had been done at an early stage of the proceedings, and if the trustees had been able to shew that the beneficiaries did in fact consent to join, and an opportunity had been given of investigating their title, and it had been shewn that they would concur in reasonable time, it is by no means clear to me that the vendors might not have enforced their contract. It is not necessary to decide that point. Here, according to the terms of the contract, the purchase was to be completed on the 24th of January. On the 7th the purchaser's solicitor puts an end so far as he can to the contract, and demands repayment of his deposit on the ground that no good title had been shewn—and at that time certainly no good title had been shewn. Nothing is done till the 29th of January, on which day, after the time for completion had expired, the vendors communicate to the purchaser that they will obtain the concurrence of the beneficiaries, not producing any evidence that that concurrence has been obtained, and, in fact, it appears that they had no power at that time to bind the beneficiaries. I think that the proposal came too late, and that it is impossible for the vendors to force a title, which as it has been already observed by the Lord Justice will require further investigation, upon a purchaser who, several weeks before the offer, had put an end so far as he could to the contract.

LOPES, L.J.:—

There are two points in this case. In the first place, it is said that there is a charge of debts on the real estate, and that therefore there is a power of sale. I think there is no such charge. It appears to me that the clause relied on is a mere authority to pay, not a direction to bring in any fund, and no enlargement of the fund out of which the debts are to be paid. Therefore, the first point in my opinion fails. Then it is said that the vendors can make a good title by obtaining the concurrence of the beneficiaries. It is not clear what the position of the beneficiaries is; it is not clear what their interests are, and there is no evidence that their concurrence has been obtained.

I think, therefore, that the title of the vendors is not made

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out, that the decision of the learned judge below was right, and that this appeal should be dismissed.

Solicitors: *Burton, Yeates, Hart, & Burton*; *Roy & Cartwright.*

H. C. J.

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In re CRAWSHAY. DENNIS *v.* CRAWSHAY.

[1881 C. 1082.]

Costs—Set-off of Costs—Rules of Supreme Court, 1883, *Order* LXV. 27, *sub-r.* 21.

A party, who under a former order in the action was entitled to certain costs out of the estate, appealed from an interlocutory order, and his appeal was dismissed with costs. The Respondent asked that under Order LXV., rule 27, sub-s. 21, these costs might be set off against the costs which the Appellant was entitled to receive, the certificate of the taxation of which was ready for signature. The Court declined to order set-off, but directed that no costs should be paid out to the Appellant for a fortnight, so as to give the Respondent time to carry in his bill of costs of the appeal, that the set-off might be considered by the Taxing Master.

THIS was an appeal by *H. H. Crawshay* from an interlocutory order of the 5th of May, 1890, made by Mr. Justice *North.*

Napier Higgins, Q.C., and *Townsend*, for the appeal.

Cozens-Hardy, Q.C., and *Fellows*, for the Respondent, were not called upon.

The Court dismissed the appeal with costs.

Cozens-Hardy:—

I ask that these costs may be set off under Order LXV., rule 27, sub-rule 21, against the costs which, by a former order, were given to the Appellant out of the estate. They have been taxed, but the Taxing Master has not yet signed his certificate. It was decided by Mr. Justice *Pearson*, in *Batten* v. *Wedgwood Coal and Iron Company* (1), that the rule extends to cases where

(1) 28 Ch. D. 317.

a person entitled to receive costs out of a fund is ordered to pay costs personally to another party.

[FRY, L.J.:—Under that rule, is an order of the Court wanted? Sufficient powers appear to be given to the Taxing Master.]

The Taxing Master's certificate will be signed almost immediately, and unless the Court makes some order the Appellant will get his costs out of the fund before we can carry in our bill for taxation.

Napier Higgins, for the Appellant:—

There is no ground for making an order. The rule gives powers to the Taxing Master, and does not contemplate an order of the Court.

[THE COURT asked how soon the bill could be carried in for taxation, and were informed that it could be done within a week.]

COTTON, L.J.:—

We think that the right course will be to order that no costs shall be paid out to the Appellant for a fortnight. This will give time for the Respondent to apply to the Taxing Master.

FRY and LOPES, L.JJ., concurred.

Solicitors for Appellant: *Hurford & Taylor.*
Solicitors for Respondent: *Pontifex & Co.*

H. C. J.

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WHITTAKER *v.* KERSHAW.

[1889 W. 766.]

Executor — Notice of Liability — Notice of Debt — Refunding by Residuary Legatee—Liability of Married Woman to be sued—Married Women's Property Act, 1882 (45 & 46 *Vict. c.* 75). *s.* 1, *sub-s.* 2.

A residuary legatee assigned the residue to his wife, Mrs. *K.*, for her separate use. The residue comprised some shares not fully paid up in a joint stock company. The executors handed over to Mrs. *K.* the certificates of the shares, but did not transfer them, and they paid over to her the cash balance of the residue. After this a call was made on the shares which the executors were compelled to pay. Mrs. *K.* refused to indemnify them, and they brought this action against her to enforce indemnity:—

Held, that if Mrs. *K.* had been a *feme sole*, she would have been liable to refund at the suit of the executors, for that the liability on the shares did not constitute a debt at the time of paying away the residue, and that though the executors would have had no right to call on the residuary legatee to refund for payment of a debt of which they had notice when they paid away the residue, they did not lose the right to refunding by paying it away with notice of a liability which had not become a debt.

Jervis v. *Wolferstan* (1) approved.

Held, further, that Mrs. *K.*, who at the time of action brought had separate estate, though she was restrained from anticipation, was liable to be sued for refunding, for that sect. 1 sub-sect. 2 of the *Married Women's Property Act*, 1882, which makes a married woman having separate estate liable to be sued "in contract, or in tort, or otherwise," makes her liable to be sued on any ground on which a *feme sole* could be sued:

Semble, that the right to compel refunding extended to the costs, charges, and expenses incurred by the executors as to the shares after they had paid away the residue.

Judgment of *North*, J., affirmed.

W. KERSHAW, by will dated the 22nd of June, 1881, appointed the Plaintiffs his executors and trustees, and bequeathed his residuary estate to his son, *John Kershaw*. He died on the 6th of March, 1886. The Plaintiffs proved his will and paid his debts and legacies. On the 12th of March, 1887, *John Kershaw* assigned all his right, title and interest in the residue to his wife, the Defendant, *Harriet Kershaw*, as her separate property. The Plaintiffs rendered an account, from which it appeared that the net residue consisted of £1103 10*s.* cash, and fifty £5 shares in the

(1) Law Rep. 18 Eq. 18.

Belgian Mills Company, Limited. On the 29th of April, 1887, the Plaintiffs paid the Defendant the £1103 10*s.* in cash, and handed over to her the certificates of the shares, but no transfer of them was executed. The Defendant and her husband executed a release to the Plaintiffs from all claims in respect of the estate except the interest of *John Kershaw* in a legacy settled by the will.

In August, 1887, a call of 10*s.* per share was made on the shares, payable on the 10th of September. The Defendant refused to pay it, and the company brought an action against the Plaintiffs, who, on the 3rd of January, 1888, paid the call out of their own moneys, £25 with 7*s.* 6*d.* interest, and £1 1*s.* 6*d.* costs, making £26 9*s.* The Plaintiffs then applied to Mrs. *Kershaw*, to recoup them and to take a transfer of the shares, which she refused to do. The Plaintiffs thereupon took out an originating summons claiming to be entitled to an indemnity out of, and to have a charge or lien on, the shares, for the call and interest thereon at £4 per cent. from the 10th of September, 1887, and in respect of the costs, charges, and expenses properly incurred by the Plaintiffs as executors and trustees since the 29th of April, 1887, in relation to the shares, including their costs of the summons, and claiming a sale of the shares or so many thereof as might be necessary for raising and paying the call, interest, and costs; and that the Defendant might be ordered to accept and execute a transfer of the shares or so many as might not be sold, and to procure such transfer to be registered.

On the 23rd of February, 1888, an order was made at Chambers, as asked by the summons. The costs, charges, and expenses directed by the order to be taxed were taxed at £67 18*s.* 9*d.* Mrs. *Kershaw* failed to pay. The shares were sold and produced only £26 5*s.*, which the Plaintiffs applied in part payment of the £67 18*s.* 9*d.* The Plaintiffs claimed £67 13*s.* 5*d.* as still due to them, and on the 7th of February, 1889, took out a summons in the originating summons action, for an order on the Defendant to pay them this sum. The summons was ordered to stand over till the trial of an action which the Plaintiffs undertook to commence by writ of summons.

The Plaintiffs accordingly commenced the present action

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against Mrs. *Kershaw*, claiming a declaration that they were entitled to be indemnified out of the residuary estate of the testator in respect of the £67 13*s.* 5*d.*, and the costs of this action as between solicitor and client; a declaration that the Plaintiffs were entitled to be indemnified against the £67 13*s.* 5*d.*, and the costs by the Defendant personally, and that the Defendant might be ordered to pay them the £67 13*s.* 5*d.* and the costs of the action as between solicitor and client.

The Defendant, by her statement of defence, alleged that she had not at the time of the commencement of the action, and had not then, any separate estate which was not subject to a restraint on alienation. That the estate of Mrs. *Kershaw* made over to her by her husband was disposed of long before the commencement of the action, and she denied that she ever came under any personal liability to pay the call or to make any other payment in respect of the shares or to pay the costs of the summons.

The action was tried by Mr. Justice *North*, who held that the case was governed by *Jervis* v. *Wolferstan* (1), and gave a judgment declaring that the Plaintiffs were entitled to be indemnified out of the residuary estate in respect of the £25 with interest at £4 per cent. from the 3rd of January, 1888, and so much of the £67 18*s.* 9*d.* as did not relate to costs of the originating summons to be certified by the Taxing Master, and in respect of the Plaintiffs' costs of this action to be taxed as between solicitor and client. And it was ordered "that the Plaintiffs recover against the Defendant *Harriet Kershaw* the said sum of £25 and interest, and the said costs to be certified and costs to be taxed, such amount to be payable out of her separate property, and not otherwise. And it is ordered that execution hereon be limited to the separate property of the said Defendant not subject to any restriction against anticipation, unless by reason of the *Married Women's Property Act*, 1882, the property shall be liable to execution notwithstanding such restraint." No order was made on the summons of the 7th of February, 1889, as to costs or otherwise.

The Defendant appealed from this judgment. The appeal was heard on the 24th and 25th of June, 1890.

(1) Law Rep. 18 Eq. 18.

Napier Higgins, Q.C., and *E. Ford*, for the Appellants :—

Executors have no right to part with the residuary estate when they have express notice of an unsatisfied liability. By the *Companies Act*, 1862, s. 16, the calls are made a debt due to the company, and *Williams* v. *Harding* (1), shews that the liability of a shareholder is contracted when he joins the company, not when the call is made. In the present case the executors knew that the shares were liable to calls, and that the company was not in a flourishing condition, and they ought to have provided for the liability. We do not deny that they were entitled to a lien on the shares for the amount of the calls; but they have had the benefit of that. They are entitled to no further indemnity. Mrs. *Kershaw* was not the creator of the trust; if she had been the trustees might have had an equity against her. They did not undertake the trust at her request: *Jervis* v. *Wolferstan* (2); *Fraser* v. *Murdoch* (3). Whatever they did was at their own risk.

But even if there would have been a right of indemnity against a man, there is none against Mrs. *Kershaw*, who is a married woman. She has made no contract at all, certainly none in respect of her separate estate, under the *Married Women's Property Act*, 1882 (45 & 46 Vict. c. 75), s. 1, sub-s. 2. Nor has she any separate estate which can be affected by the judgment in this action, all being subject to restraint on anticipation. Therefore on this ground also the action cannot be sustained: *Leak* v. *Driffield* (4); *Leedham* v. *Chawner* (5).

Lastly, the Plaintiffs might have obtained the relief they now ask, if they were entitled to it, on the former summons when all the facts were before the Court. We are therefore entitled to plead that the matter is *res judicata*: *Phosphate Sewage Company* v. *Molleson* (6).

Cozens-Hardy, Q.C., and *Upjohn*, for the Plaintiffs :—

The *Married Women's Property Act*, 1882, has altered the law

(1) Law Rep. 1 H. L. 9.
(2) Ibid. 18 Eq. 18.
(3) 6 App. Cas. 855.
(4) 24 Q. B. D. 98.
(5) 4 K. & J. 458.
(6) 4 App. Cas. 801.

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laid down in *Pike* v. *Fitzgibbon* (1), and judgment can be enforced against after-acquired separate property of a married woman.

[BOWEN, L.J.:—Can you obtain judgment if she has no separate property at the time of the trial?]

We submit that we can. Under sect. 1, sub-sect. 2, judgment can be given against her on a contract if she had separate estate when the contract was made: *In re Shakespear* (2); *Palliser* v. *Gurney* (3).

[BOWEN, L.J.:—On what do you found your claim for relief?]

On this—that the executors took the shares subject to liability for calls, a liability which could not at the time be discharged, and having paid away the residue without notice of a debt, they can, when they are compelled to pay a debt, call on the legatee to refund. The fact that they had notice of a liability does not deprive them of that right: *Jervis* v. *Wolferstan* (4), is express on the point, and the observations of Lord *Blackburn* in *Fraser* v. *Murdoch* (5), do not throw any doubt upon this part of the judgment of the Master of the Rolls. The Plaintiffs as trustees have a right to indemnity.

[They were then stopped by the Court.]

Napier Higgins, in reply:—

It was the duty of the executors to ascertain whether a call was likely to be made and to retain enough to meet it. In *Jervis* v. *Wolferstan* the Master of the Rolls proceeds on the ground that the liability was shadowy. If they had transferred the shares the possibility of a B. list of contributories might be regarded as shadowy within the remarks of the Master of the Rolls, but here the liability was obvious and substantial. A married woman cannot be sued in this way—there was no contract and no tort. I say there is no right to indemnity where the executors remain liable on the shares in consequence of their own neglect in not transferring them. We ought not to be doubly vexed; one proceeding would have given full relief, and we ought not to be made to pay the costs of two.

(1) 17 Ch. D. 454.
(2) 30 Ch. D. 169.
(3) 19 Q. B. D. 519.
(4) Law Rep. 18 Eq. 18.
(5) 6 App. Cas. 855, 872.

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We have considered this extraordinary case and have come to a conclusion upon it. The testator left his residuary personal estate to Mr. *Kershaw*, who assigned it to his wife for her separate use. The residue comprised fifty £5 shares in a company on which £3 each had been paid. The executors handed over to Mrs. *Kershaw* the clear residue; so much of it as consisted of cash was paid to her, and the certificates of the shares were delivered to her, but by some accident the shares were not transferred. After this the company brought an action against the executors for calls on the shares, and they were obliged to pay. The executors applied to Mrs. *Kershaw* to indemnify them, which she refused to do. They then sought indemnity by proceedings in the Chancery Division to have the shares sold. The shares were sold in pursuance of an order of the Court, but did not produce nearly enough to indemnify the executors. Mrs. *Kershaw* continuing to resist their claim they brought the present action to compel indemnity out of her separate estate. She resists the claim for indemnity on several grounds.

Her first point is that even if she had been a *feme sole* she would not have been liable. If an executor pays away the residue to the residuary legatee without knowledge of anything that interferes with the right to receive it, and debts are subsequently discovered which he is obliged to pay, he can call on the residuary legatee to refund. This is not a right depending on contract. It is urged that here the executors have deprived themselves of that right by handing over the residue with knowledge that calls might become payable. Now if an executor pays the money to the residuary legatee with knowledge of a debt and he is afterwards obliged to pay that debt, he no doubt cannot call on the residuary legatee to refund. It is urged that here there was notice of a debt. But there was no debt until a call was made. There was only a liability which might become a debt. Now it was held by *Jessel*, M.R., in *Jervis* v. *Wolferstan* (1), that notice of a liability when the executor pays over a residue does not take away his right to make the

(1) Law Rep. 18 Eq. 18.

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residuary legatee refund if it afterwards becomes a debt. It is true that the Master of the Rolls speaks of the shadowy nature of the liability in that case; but he does not proceed on that, he goes on the principle that notice of a mere liability is not enough, there must be notice of a debt. Considering how many persons are liable on shares and leases it would produce enormous difficulty in the administration of estates to lay down that an executor must keep assets in hand until every liability of the estate has been satisfied. The shadowy nature of the claim was not the principle of the decision of the Master of the Rolls. The principle was that where there is no notice of a debt the executor does not lose his right to recover. It was urged that a call constitutes a debt from the time when the testator became a shareholder. I am of opinion that it does not, and that there is no debt till the call is made. We were referred to the *Companies Act*, 1862, s. 16, which enacts that "all moneys payable by any member to the company, in pursuance of the conditions and regulations of the company, or any of such conditions or regulations, shall be deemed to be a debt due from such member to the company, and in *England* and *Ireland* to be in the nature of a specialty debt." They are to be a debt; but when are they to be a debt? When they become payable according to the regulations of the company, and by the articles the shareholder is only to make the payment when he is called upon by the directors to do so. There is therefore no debt until a call is made. We were also referred to sect. 75, which enacts that "the liability of any person to contribute to the assets of a company under this Act, in the event of the same being wound up, shall be deemed to create a debt (in *England* and *Ireland* of the nature of a specialty) accruing due from such person at the time when his liability commenced, but payable at the time or respective times when calls are made as hereinafter mentioned for enforcing such liability." But that section only applies when the company is being wound up, and we have no winding-up here. There is a marked distinction between sects. 16 and 75. There was then in the present case no debt existing when the executors paid over the residue.

I am of opinion then, that if Mrs. *Kershaw* had been a *feme*

sole, the Plaintiffs would have been entitled to call on her to refund.

But Mrs. *Kershaw* is a married woman, and Mr. *Higgins* contended that she cannot be sued here because she has entered into no contract in respect of her separate estate, and that the claim of an executor to indemnity does not give a right to sue a married woman who has entered into no contract. No doubt there is here no contract by her; but I do not agree that therefore she cannot be sued. The *Married Women's Property Act*, 1882, sect. 1, sub-sect. 2, enacts that "a married woman shall be capable of entering into and rendering herself liable in respect of and to the extent of her separate property on any contract, and of suing and being sued, either in contract or in tort or otherwise, in all respects as if she were a *feme sole*." It is urged that all this is to be read only in connection with the power to contract. I do not think so. The power to contract is distinct from the liability to be sued, for the section says that she shall be liable to be sued in contract or in tort "or otherwise." We cannot disregard the words "or otherwise." They make her liable to be sued as if she were a *feme sole*, and here, if she were a *feme sole*, the executors would be entitled to sue her and recover this money.

It was urged that Mrs. *Kershaw* has no separate estate. That is not so. She has separate estate, and although the remedy against it may be defeated by the restraint on anticipation, still she has separate estate.

It was urged that the judgment in this case will to some extent cause the executors to be paid twice over. That is not so, for the judgment excludes the costs of the former action; so the executors will only be paid what has not already been paid in that action. Then it was said that this judgment gives the executors what they got under the order in the former action. That is not so. They got a right under the previous order, but not an order for payment.

It was urged that the former judgment made this a *res judicata*, and that what was there given is the measure of the rights of the Plaintiffs. That is not so. The former action was for a limited purpose—to have the shares sold and to get indemnity out of the

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proceeds. The present action is for refunding; so the two actions have not the same object.

The above were the only points argued; but it occurred to Lord Justice *Fry* and myself that the costs of the proceedings stand on a different footing as to indemnity from what the executors have been compelled to pay on the shares. We are, however, inclined to think that they should be treated as charges and expenses properly incurred in the administration of the estate by the Plaintiffs, and though they stand on a different footing from the calls, we think that the decision of Mr. Justice *North* ought not to be varied.

It was urged that it is a hardship on the Defendant to be vexed with two actions. But the present claim could not be dealt with in the former action, and we think that the institution of that action was a reasonable proceeding, for the parties could not foresee that the proceeds of sale would be insufficient, and if they had not been so the Plaintiffs would have obtained their indemnity at very small expense. I think, therefore, that the former proceedings are no ground for depriving the Plaintiffs of any part of the costs of the present action.

FRY, L.J.:—

I am authorized by the Lord Justice *Bowen* to say that he agrees in the view we take of this case.

Mr. Justice *North* has given the Plaintiffs relief as to two amounts: (1.) the calls; (2.) the unpaid balance of the costs, charges and expenses of the Plaintiffs, as trustees. These two amounts stand on different grounds.

The main argument of the Appellant was that the Plaintiffs paid the residue over to her with notice of a debt, or, at least, with notice of a liability which brought the case within the same rule as if there had been notice of a debt. I am of opinion that there was no notice of a debt, but only notice of a liability. According to sect. 16 of the *Companies Act*, 1862, the liability to pay up any part of the money due on a share becomes a debt only when it becomes payable according to the regulations of the company, *i.e.*, when a call is made. It was a liability until a call was made, and then became a debt. Sect. 75 provides that when

a call is made in the winding-up of a company the call shall be a debt from the time when the liability was contracted. Those words would have been idle if, apart from winding-up, the taking the shares created a debt. The executors, then, in this case had no notice of a debt when they paid over the residue.

But it was urged that notice of a liability was sufficient. This point was considered by the late Master of the Rolls in *Jervis* v. *Wolferstan* (1). His Lordship there says (2): "I have looked through many cases, and I have asked for the assistance of the Bar, and I cannot find the rule stated in wider terms than these, that he cannot recover from a legatee a payment made with notice of a debt." That rule appears to me to be good law and founded on good sense. If an executor could not, without losing his right to recover back the assets, part with the residue if he had notice of any liability, he would in many cases have to keep in hand a large portion of the estate.

It has been urged that Mrs. *Kershaw* has no separate estate, but I think there is nothing that deserves consideration in that point.

It has been contended that a married woman cannot be sued in respect of a liability of this kind. Now, on what principle can she be sued? This is an important question. It is said that she is sued on the ground of an implied contract to indemnify, but that does not appear to me a satisfactory ground on which to rest her liability. I think that her liability to be sued here arises under the words, "or otherwise," in sect. 1, sub-sect. 2, of the *Married Women's Property Act*, 1882. The action here stands on this footing. A contract was entered into by the testator, whose residuary estate she has received, under which contract after his death a debt arises. The creditor could sue the executor, and recover to the extent of the assets. The executor pays him, and is subrogated to his rights against the estate, and against the legatee of that estate. The effect of sect. 1, sub-sect. 2, as it appears to me, is to allow a married woman to be sued in respect of anything in respect of which a man could be sued, subject to this, that her power to contract is limited, and that the remedy is confined to her separate estate. The right of action is the same as against a man, but the relief is different.

(1) Law Rep. 18 Eq. 18. (2) Law Rep. 18 Eq. 25.

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A question which was not argued, but which we have considered, is, whether the right to recover extends to costs, charges, and expenses, incurred by the executors after paying away the residue. My impression is that it does, and as the point has not been taken, we act on that view; but if the point should come on hereafter to be contested, we may not consider ourselves bound by what we do on the present occasion.

Solicitors: *Woodcock, Ryland, & Parker; Pitman & Sons,* agents for *J. E. & R. Whitworth, Manchester.*

H. C. J.

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[1889 H. 1718.]

Company—General Meeting—Notice Convening—Chairman—Amendment to Resolution—Conduct of Member—Waiver.

The rules of a company provided that no shareholder should be qualified to vote unless he had held five shares for six months before the meeting, but the number of the votes of a qualified proprietor depended on the number of his shares, without regard to how long he had held the other shares. Notice was given of an extraordinary meeting for the 4th of April, 1889, with a view "to alter the scale of voting by giving to every qualified proprietor one vote for each share." On the 1st of April the directors circulated the resolution to be proposed, which was to the effect that every proprietor should have one vote for each share, but should have no vote for any share unless he had held it six months. *H.*, a proprietor, attended the meeting, and proposed that to qualify a person to be a director he must have held shares for a certain period. The chairman ruled this out of order, upon which *H.* moved an amendment that the qualification of six months as to shareholders should be expunged. He did not put the amendment in writing, or in very clear terms. The chairman, however, understood the motion in the above sense, and asked whether any one seconded it, and, it having been seconded, he was about to put it to the meeting; but after consulting the solicitor of the company he said he was advised that no amendment could be put, and that the proposed resolution must either be accepted as it stood or rejected. He therefore refused to put the amendment. The original resolution was then passed, *H.* moving its rejection and voting against it. It was confirmed at a subsequent meeting, at which *H.* attended, and protested on the grounds that the resolution was not within the notice calling the meeting, and that the chairman had refused to put his amendment. On an action by *H.* to set aside the resolution on the above grounds:—

Held, by *Chitty*, J., that the conduct of the Plaintiff at the meeting

amounted to a waiver which precluded him from bringing an action against the company of which he was a member on the ground of any irregularity in the notice: that any member wishing to insist upon his right to move an amendment, or to protest against the ruling of the chairman, ought to formulate and put before the chairman, either orally or in writing, the terms of his amendment, and should also put the chairman on his guard, by cautioning him that his ruling was objected to, so as to give him an opportunity of reconsidering his position: and that on these grounds the Plaintiff's action failed, and must be dismissed.

Held, on appeal, that *H.* had moved an amendment which was sufficiently definite, and that the chairman was wrong in refusing to put it to the meeting. That, as the chairman after consulting the solicitor of the company had deliberately ruled that no amendment could be put, *H.* was under no obligation to contest that ruling or to leave the meeting, but was justified in voting against the resolution; that his so doing could not be deemed acquiescence in the ruling; and that as the chairman's refusal to put the amendment had withdrawn a material and relevant question from the consideration of the meeting, the resolution must be set aside.

Whether the resolution was within the scope of the notice calling the meeting, *quære*:—

Per Cotton and *Fry*, L.JJ., *semble*, that it was.

ACTION by a proprietor against the bank to test the validity of certain resolutions altering the deed of settlement of the bank passed at an extraordinary general meeting on the 4th of April, 1889, under the following circumstances.

The deed of settlement of the bank, dated the 2nd of June, 1834, provided:

(12.) That an extraordinary general meeting might be called at any time.

(15.) That no other business should be transacted at any extraordinary general meeting besides that for which it had been specially called, except it was called at the same time and place with any yearly general meeting, in which case any other business for which an extraordinary general meeting was not specially required might be transacted at such yearly meeting and extraordinary general meeting.

(18.) "That no proprietor or other holder of shares shall be considered qualified to vote at any general meeting or ballot who shall be a holder in his or her individual right of less than five shares in the capital of the society, or who, not being an original proprietor, shall have been such a holder for less than six calendar months previous to such general meeting or ballot."

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(19.) "That at any general meeting and ballot every qualified proprietor holding five shares in the capital of the society and less than ten shares shall be entitled to one vote, and holding ten shares and less than twenty shares shall be entitled to two votes, and holding twenty shares and less than fifty shares shall be entitled to three votes, and holding fifty shares or upwards shall be entitled to four votes and no more."

(20.) "That a majority of the votes of the qualified proprietors present at two successive extraordinary general meetings to be specially called for the purpose . . . shall be requisite and sufficient for making new laws, regulations, and provisions for the society or copartnership, and for amending, annulling, altering, or repealing all or any of the previously existing laws, regulations, and provisions thereof, or for dissolving the society . . ."

(27.) That two successive extraordinary general meetings specially called for the purpose should have full power to make any new laws, regulations, and provisions, or to make, alter, or repeal all or any previously existing laws, regulations, and provisions.

(29.) "That notice of every yearly general meeting and extraordinary general meeting shall be given by the court of directors by advertising the same in any two or more *London* daily newspapers . . . at least twenty-one days and not more than thirty days before the time fixed for holding such meeting, and in such advertisements the day and hour of the meeting, and the place at which it will be held, and (as to extraordinary general meetings and adjourned meetings) the objects for holding the same shall be specified."

The annual general meeting of the bank was advertised for the 4th of April, 1889, and the advertisement, which was dated the 7th of March, continued as follows:—

"Notice is hereby also given, that an extraordinary general meeting of the proprietors will be held, at the same place, at one o'clock, or so soon afterwards as the business of the ordinary general meeting shall be concluded, for the purpose of considering, and, if thought fit, passing special resolutions to be then

proposed for amending and altering the deed of settlement of the bank in the following particulars:—

"1. To alter the scale of voting by giving to every qualified proprietor one vote for every share held by him or her.

"2. To enable the qualified proprietors to give their votes at every ballot either personally or by proxy."

3. [Is immaterial for the present purpose.]

"Should the resolutions to be proposed at the said extraordinary general meeting or any of them be duly passed, the resolutions or resolution so passed will be submitted for confirmation to a second extraordinary general meeting of the proprietors, which will be subsequently convened."

On the 1st of April, 1889, the directors circulated amongst the proprietors of the bank the full text of the resolutions to be proposed; the one on which the main discussion arose at the meeting, and on which the argument in Court was founded, was as follows:—

"(1) That the 18th clause of the deed of settlement be repealed, and that instead thereof the following clause be inserted immediately after the 17th clause:

"That every proprietor shall have one vote for every share held by him or her, provided that no proprietor shall be entitled to vote at any general meeting or ballot in respect of any share unless he or she shall have been registered as the holder of such share for at least six calendar months prior to such general meeting, or in case of a ballot, prior to the general meeting at which the ballot is granted."

A shorthand writer's note of the proceedings at the meeting of the 4th of April was produced, which was admitted on both sides to contain a correct account of what passed. After the above resolution had been proposed and seconded, the Plaintiff spoke, and said that he thought it was an extreme course to give one vote to each share and to fix no maximum; but he would not press that point. He went on to urge strongly that it was unreasonable that persons should be eligible as directors though they had only just obtained their shares, and that a shareholder should not be entitled to vote unless he had held his shares six

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months. He concluded by saying, "I do not say that it is unreasonable that a shareholder should be on the register for six months; but I say that a director should be on it for longer than six months, namely, twelve months or two years, and therefore I will support the resolution if that qualification can be added; but if not, then I should strike out the six months' disqualification of an ordinary shareholder. I beg to move that so far as that part of the resolution is concerned; but if that cannot be done, then I object to the other provision. I am aware that it stands in the deed at present." The chairman: "You mean as to the six months?" Mr. *Henderson*: "Yes." A proprietor: "That a director should have been a shareholder for one year." The chairman: "You cannot raise that question just now." A proprietor: "That a person who is nominated as a director should have been on the register for one year, or put it equally with a shareholder, namely, that a person should have been on the register for six months before he is qualified to be nominated as a director." Mr. *Henderson*: "I am quite willing to have it either way." The chairman: "Does any gentleman second Mr. *Henderson's* amendment?" A proprietor: "I second it." The chairman "Before I put it I will give a word of explanation." He then went on to urge that it was desirable to retain the six months' qualification as to shareholders, and, after conferring with the solicitor of the company who was present, he ended by saying: "I find that the proposal of Mr. *Henderson* is *ultrà vires*. I find that from the nature of the notice which has been given with regard to these proposals they must either be accepted or rejected." Mr. *Henderson*: "That is precisely what I say—to strike out the six months, or add that the directors must be equally qualified." The chairman: "Unfortunately, we cannot do that." Mr. *Henderson*: "Then I must vote against the resolution." The chairman: "It cannot be done; I am advised by the legal officer of the bank that either we must carry this alteration in terms of the notice which has been given with respect to this alteration, or else we must reject it." Mr. *Henderson*: "Then I must move its rejection." After some further conversation, Mr. *Henderson* said: "I move the rejection of the resolution on this ground, namely, on the statement that we cannot amend—that we must take the resolution as a whole or reject it." The chairman:

"Does any one second the rejection of it?" Another proprietor said: "Am I to understand that the only course open to those who agree with the proposed amendment is to reject the amendment now, and to reserve it for a future meeting? Why should we not vote upon it now?" The chairman repeated that nothing could be done but to accept the resolution as it stood, or reject it. After some angry discussion, the resolution was then put and carried. It was confirmed at the subsequent meeting, held on the 2nd of May, at which the Plaintiff attended, and protested on the ground that the resolution was not covered by the notice convening the meeting for the 4th of April, and also that his amendments were not put to the meeting.

On the 14th of May the Plaintiff commenced the present action against the bank, claiming a declaration that the resolutions which the bank purported to pass on the 4th of April, and confirm on the 2nd of May, 1889, were void and invalid, and an injunction to restrain the bank from acting upon or treating as valid the said resolutions or any of them, and from disregarding the existing regulations of the bank which the said resolutions purported to repeal.

The action came on for hearing before Mr. Justice *Chitty* on the 1st of May, 1890.

Romer, Q.C., and *John Henderson*, for the Plaintiff:—

The resolutions proposed were not covered by the notice of the 7th of March; the circular of the 1st of April, if it was intended as a notice, was out of time and bad; we therefore object to this resolution, because it was outside the notice convening the meeting; the resolution was irregular, and ought not to have been put at all. Then we object on the ground that the proceedings at the meeting were irregular; the chairman had no right to decline to put the amendment; his ruling that no amendment could be moved was wholly wrong. On these grounds we say the resolutions are invalid, and should be set aside.

Rigby, Q.C., *Maclean*, Q.C., and *C. G. Hamilton*, for the Defendants:—

The Plaintiff never objected at the meeting that the notice

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was irregular or that this resolution was not covered by the first notice; his conduct at the meeting precludes him from raising any such question now. It is not alleged that he did not know what was to be proposed. We submit, too, that the resolution was within the terms of the first notice.

The Plaintiff never formulated any definite amendment as he ought to have done; he never challenged the ruling of the chairman; even if the chairman was wrong the meeting, and what was passed at it, is not thereby invalidated.

[*In re British Sugar Refining Company* (1), and *Smith's* Handbook of Public Meetings, were referred to.]

Henderson, in reply:—

The right to have my amendment put is an individual right in respect of which an action can be brought: *Pender* v. *Lushington* (2).

CHITTY, J. (after observing that this was an action by a single shareholder against a company, not one on behalf of himself and all other shareholders, nor one in the name of the company against its directors, continued):—

The first question I have to decide relates to the notice concerning the meeting of the 4th of April, which was an extraordinary general meeting, and unquestionably there was a notice duly convening it. Clause 29 of the deed of settlement requires that the notice should specify the objects for holding the meeting, and one point raised by the Plaintiff is, that the notice given was insufficient on the ground that it did not, within the fair meaning of the clause referred to, specify the objects.

[His Lordship then stated the notice, and referred to the circulars sent out by the directors on the 1st of April, observing that the latter was not a notice within the terms of the deed of settlement, as being out of time; and having read this circular as stated above, continued:—]

Now it cannot be questioned that the first sentence down to the proviso in that resolution was within the scope of the

(1) 3 K. & J. 408, 416. (2) 6 Ch. D. 70.

notice convening the meeting; but it is objected that the proviso as to the six months' qualification is not within the scope of the notice. The first part of the resolution was within the scope of the notice, because it was an alteration in the scale of voting by giving to every proprietor one vote for every share; but it is objected that inasmuch as the objects for holding the meeting were to be specified, it was not competent for the meeting to entertain that part of the resolution that was contained in the proviso. To understand the argument submitted upon this point it is necessary to refer shortly to clauses 18 and 19 of the deed of settlement.

[His Lordship then stated these clauses, observing that clause 18 was a disqualification clause attaching to the holder and not to the shares, and that the 19th clause was to be read separately, so that when once the voter was not disqualified he could use all his voting power, and continued:—]

Then was it competent for the meeting to entertain this resolution in the form it was proposed to be submitted to it? In cases of this kind it is settled that the notice which specifies the business to be done, or the objects of the meeting, is to be a fair notice, intelligible to the minds of ordinary men, the class of men who are shareholders in the company, and to whom it is addressed. The Court does not scrutinise these notices with a view to exercise criticism, or to find out defects, but it looks at them fairly. I think the question may be put in this form: What is the meaning which this notice would fairly carry to ordinary minds? That, I think, is a reasonable test. Another matter of very considerable importance in dealing with this as a practical question, is, how did the meeting itself understand the notice? There were questions raised, and discussions at the meeting, but no one raised any objection on the ground that this addition of the words as to the qualification applied to each share, was not within the scope of the notice; and it is plain that the Plaintiff, who took an active part in the meeting, did not raise the objection. It is plain he put no one on his guard, either the chairman or any of the shareholders there assembled. Nay, more, the Plaintiff, according to his case, proposed an amendment which would have embodied this disqualification, annexing the

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qualification to each individual share, if, as part of his proposition, he could have carried something which was altogether outside the scope of the objects of the meeting, namely, a similar qualification clause with regard to the directors.

Now under these circumstances have I not here a very fair test of how the notice was understood by men of the class to which it was addressed? I think I have. And in particular have not I a strong case as against the Plaintiff to shew how he understood it? I think I have. I think, therefore, that it does not lie in the Plaintiff's mouth to say that the resolution proposed was not within the fair meaning of the notice which was given, and, particularly seeing that this is an action by the Plaintiff alone. The result is, I think, that he has himself waived the objection, and it is not open for him now to raise it. Therefore I decide the first point against the Plaintiff.

The next point is with reference particularly to the proceedings at the first meeting, and the question is one of the regularity of the proceedings. It is contended on behalf of the Plaintiff that he put before the meeting an amendment which was a proper amendment, and that the chairman declined to allow that amendment to go to the meeting. I will not read through the shorthand notes of what took place. It is agreed that they fairly represent what was said and done.

[His Lordship then stated what took place at the meeting down to the time prior to the ruling of the chairman that the amendment was out of order, and continued:—]

I stay, for one moment now, to consider what was the condition of the affairs of the meeting at that time. There was no amendment in terms. No amendment in any shape had been submitted to the chairman which he was asked to put to the meeting, and although the chairman might have thought that he could have extracted from the speech the Plaintiff's meaning (and possibly, from what I can see was taking place at that time, he would have assisted him in putting it into shape), it never was reduced into any such definite form as could have been placed before the meeting. Therefore there was at this moment no amendment before the meeting, and consequently there was nothing that the chairman could put.

[Then, after stating the ruling of the chairman, his Lordship continued:—]

If the Plaintiff had put his amendment into the form, which his speech certainly did suggest, of proposing in any way to alter the qualification of the directors, then clearly it was a matter which could not have been put to the meeting. But if the amendment was put into the form of proposing to omit all the words which relate to the six months' qualification of the shareholder, that is to say, to omit certain words in the resolution itself which was then before the meeting, the amendment certainly could have been put. If the advice given to the chairman was that no amendment could be received to the resolution, the advice was erroneous. About that I entertain no doubt whatever. But it is clear at this point there was some embarrassment, and it is plain that the chairman was of opinion that he could not take any amendment.

Now I come to what is the critical question in this action. It appears to me that meetings of this kind are not bound to model all their proceedings strictly on the rules of the House of Commons. Those rules are very useful; they are the result of long experience, and when those rules are understood they work out admirably. But they are too complex for the apprehension of ordinary shareholders. There is one point which I mentioned in the argument, which I repeat here by way of illustration, and that is, that in the House of Commons the Speaker puts matters in a deliberative way. When he puts the question, and cries of "Aye" or "No" are heard, the Speaker says, "I *think* the ayes have it." That is a deliberative expression of his opinion, but not final. Then that is sometimes challenged once or twice, but not definitely challenged, and after a time it does occur that there is no further challenge. Thereupon the Speaker says, "The ayes have it." That is final. After that no point of order can be raised. But in a case of this kind, I think the chairman is not to be caught suddenly by an expression of opinion when he, without very much experience (of course I am speaking of chairmen in general, not of this chairman), on the spur of the moment has to come to some conclusion upon some proposal before the meeting, and I am prepared to hold, and do hold, that he is allowed to

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express his opinion in a deliberative way. In this case I think that it was quite competent for the Plaintiff, without any breach of order or any want of decorum, immediately, or, at any rate, before the voting took place upon the resolution itself, to rise to a point of order, and, without saying that he must use these words, to have addressed the chairman somewhat in this fashion: "I respectfully object to your ruling. I think you are in error, and I give you notice that I intend to insist on my right to move an amendment." Then I think in the state the business was in at the time, he must have told the chairman what his amendment was; in other words, he must have definitely challenged the chairman. It was his duty to put that, of course, in a courteous way, and without any breach of order. Then the chairman would have had an opportunity of reconsidering whether his opinion was right or wrong, and some other shareholders might have got up, knowing something about the conduct of business, and suggested to the chairman that it would be proper, if the amendment had been put in the form which was legitimate, to put it to the meeting. If Mr. *Henderson* had after this tendered his amendment containing some clause as to the qualification of directors, and also containing some words with reference to the qualification of shareholders, the chairman would have said, "I am bound to reject your amendment, and I do so." That, I think, is a good illustration of the state of proceedings and how they ought to have been conducted. The Plaintiff's counsel pressed on me not to guess, and I do not. I do not attempt to guess in this case what the chairman would have done if the Plaintiff had said, "Now there is my amendment. My amendment is to omit all the words as to the qualification of shareholders." But the chairman would have been in a position to reconsider his opinion. That was not done. There, I think, the Plaintiff failed in his duty if he meant ever to raise this point hereafter. I do not say he was bound to do it, because no man is bound to move an amendment. It is entirely within his own breast whether he shall do it or not. I do not rely solely on what took place afterwards. I said there was no such amendment proposed, but it is noticeable that after this had occurred, when the chairman had expressed his opinion, which I think, and hold, he did in a deliberative way, the

Plaintiff said he moved the rejection of the resolution, though I am not taking him too much upon the mere words. Of course he could not move the rejection. That would be an irregular mode of dealing with the question. The right way, as indeed I think the Plaintiff saw during the meeting, was to vote against the resolution; and the resolution was then put and carried.

Now in these circumstances, can the Plaintiff come forward and question the regularity of the proceedings? I think not. I think that the course that he pursued is equivalent to a waiver on this part of the case. I think he never placed the chairman in the position in which he ought to have placed him, and consequently that his objection, founded in part on the allegation that his amendment was not put, is not sustained. I say the allegation that his amendment was not put, because he never placed before the chairman, either orally or in writing, the terms of the amendment itself. That disposes of the case, for if the resolutions at the first meeting were good, as I have held they were, then there is no question left for me to decide as to the regularity of the proceedings at the second meeting.

The result is, I think the Plaintiff fails, and his action must be dismissed with costs.

W. C. D.

From this judgment the Plaintiff appealed. The appeal was heard on the 11th of July, 1890.

Romer, Q.C., and *John Henderson*, for the Appellant:—

The grounds on which we rely are two—(1) that no proper notice of the meeting was given; (2) that supposing the meeting duly summoned, the resolutions passed at it are invalid, because the chairman refused to put any amendment.

As to the notice, we say that it was bad, because it gave no intimation of an intention to propose any alteration as to the qualification of shareholders. The 18th clause of the deed of settlement defines the persons qualified to vote—all persons can vote who have held five shares for six months. The 19th states how many votes they are to have. If a shareholder is qualified by having held five shares for six months, the number of his

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votes does not depend on how long he has held his other shares. The notice referred to the scale of voting, but did not refer to altering the qualification. The circular of the 1st of April, 1889, was given too late to cure this defect.

But what we principally rely upon is, that the chairman ruled that no amendment could be moved, and that the resolutions must be accepted as they were, or rejected; and he refused to put to the meeting an amendment moved by Mr. *Henderson*, and seconded.

Rigby, Q.C., *Maclean*, Q.C., and *C. G. Hamilton*, for the company:—

We contend that the notice summoning the meeting was sufficient. Nobody receiving it would doubt that the whole question of shareholders' voting would be before the meeting. The stress laid upon "qualified" is mere special pleading. Suppose, however, that this objection is substantial, the Plaintiff cannot take advantage of the defect; he took part in the proceedings on the footing of the meeting being competent to discuss this question, and he is estopped by his conduct.

[LOPES, L.J.:—Suppose he did not appreciate the objection at the time, but afterwards was advised that the proceedings were irregular, is he precluded from taking advantage of the irregularity?]

We submit that he is. He was a shareholder, and if there was any irregularity he must be taken to have had notice of it.

As to the amendment, it no doubt is usual to allow amendments; but there was no formal distinct amendment before the meeting; and, that being so, we say that the resolutions cannot be upset because the chairman ruled that amendments could not be put. If the chairman so ruled, a shareholder who wished to put an amendment ought to have protested against the ruling, or left the room. Mr. *Henderson* chose to remain and vote on the resolution, and by so doing must be taken to have acquiesced in the chairman's ruling. Instead of protesting, he took the alternative of voting against the resolution.

COTTON, L.J.:—

Two objections are taken to the resolutions passed at the meeting of the 4th of April. The first is, that the objects for which the meeting was called were not sufficiently expressed in the notice calling it. I do not think it necessary to decide that point, having regard to the opinion that we all entertain on the second objection; but as at present advised I think that the notice fairly and reasonably expressed to the shareholders what matters were going to be discussed at the meeting.

The second objection is this: Mr. *Henderson* says, "I wished to propose an amendment to the resolution; the chairman refused to put it; and therefore he prevented the opinion of the shareholders being taken on a matter which was legitimately within the power of the meeting."

It is said that no definite proposal was laid before the meeting by Mr. *Henderson*. I do not think that a notice calling a meeting ought to be treated very critically in order to see whether we cannot pick out some defect in it; and similarly I think we ought not to treat too critically the question whether an amendment was proposed by Mr. *Henderson*. He did not do it in the most strict and formal way; he did not hand in a formal amendment to the chairman; yet I think he did really propose an amendment to the resolution, and that the chairman understood what the amendment was, for he asked who would second it, and then, after it was seconded, he refused to put it to the meeting, stating that he was advised that no amendment at all could be proposed, and that the meeting must take the resolutions which had been placed before them *en bloc*, or reject them altogether. Now I quite agree that Mr. *Henderson* first proposed a resolution that the directors should have the qualification of having held shares for a year. That was his principal object; but he said that if not—that is to say, if the proposal to alter the qualification of the directors could not be accepted—then he should propose to strike out the six months in the qualification for ordinary shareholders. He did not say in terms, "I move as an amendment," or "I intend to move as an amendment that this qualification of an ordinary shareholder shall be struck out"; but I think the reasonable and fair meaning of what he said—not treating the

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matter by the rules of special pleading — was, "If I cannot introduce this qualification of directors, then I propose to strike out that portion of the resolution proposed which requires the qualification of six months for an ordinary shareholder." And although his language is not quite so full or accurate as it might have been, yet I think it fairly expressed to the meeting and to the chairman what he wished to do, if he could not introduce by way of amendment the qualification of directors. He says: "I am aware that it stands in the deed at present"—that is to say, the qualification of holding shares for six months. The chairman: "You mean as to the six months?" Mr. *Henderson*: "Yes." Then a proprietor says that "a director should have been a shareholder for one year." No doubt he was referring there to the first amendment proposed by Mr. *Henderson*. Then the chairman says, "We cannot raise that question just now"—that is to say, any proposal imposing a disqualification on a director is beyond the notice given for the meeting, and therefore cannot be raised. In that I think he was perfectly right; but he does not say that with regard to the latter part of Mr. *Henderson's* proposal, and he goes on to consider that. Then Mr. *Henderson* says, "I am quite willing to have it either way"—that is to say, to have either amendment; but the chairman has said already that the one amendment cannot be put. Then the chairman says, "Does any gentleman second Mr. *Henderson's* amendment?" A proprietor says, "I second it." The chairman could not so far stultify himself as to ask whether any proprietor supports the amendment which he had decided could not be put. He proposed at this period to put the second amendment which Mr. *Henderson* proposed to the meeting. Then we come to the speech of the chairman before he put the amendment, which he did not rule to be out of order at that time, and it shews what he understood to be the amendment: "Before I put it" (that is, "before I put the amendment") "I will give a word of explanation in the first place with regard to what my friend here stated as to an alteration and an apparent inconsistency in our conduct. I must remind him that Mr. *Hamilton*, who was in the chair, undertook, in deference to the views expressed by a very considerable number of proprietors, that the board should take into considera-

tion such alterations in the deed of settlement as might seem to be for the general interest of the proprietary and the bank, and it is in pursuance of that pledge that this special general meeting is now held, and these resolutions are now put before you. With regard to the term of six months which Mr. *Henderson's* amendment touches" (that is, the amendment which he did not rule to be out of order, as not being within the notice), "perhaps I may be allowed to say that that term has always been in the deed of settlement of this bank controlling the voting; therefore it is no new departure on our side in introducing it into this amendment of the deed. It has always been the rule, and we only propose to conserve what hitherto has been the rule." The expression "no new departure" shews that the amendment which he asked some one to second was an amendment with reference simply to the six months' qualification of shareholders, which he says had always been the rule, and by proposing to put it in the amendment of the deed they were not introducing any new principle, but only retaining what was already provided by the deed of settlement. Then he seems to have had some conversation with some one, because he says ultimately, "I find that the proposal of Mr. *Henderson* is *ultrà vires*." Why? "I find that from the nature of the notice which has been given with regard to these proposals they must be either accepted or rejected." He is not referring now to the proposal to alter the qualification of a director; and he says in substance, "This amendment which I intended to put, it being seconded by a proprietor, I find I cannot put, because the proposed resolutions must be adopted *en bloc*, or not at all." Then Mr. *Henderson* says, "That is precisely what I say—to strike out the six months." There I do not quite see what Mr. *Henderson* means; but he goes back to this, that what he was proposing was to strike out the six months' qualification of an ordinary shareholder, or add that the directors must be fully qualified. "Unfortunately, we cannot do that," says the chairman—that is, cannot propose to the meeting, having regard to the notice, that an additional qualification should be required of a director. Then Mr. *Henderson* says, if what he proposes cannot be done, "I must vote against the resolution." The chairman: "It cannot be done. I am advised

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by the legal officer of the bank that either we must carry this alteration in the terms of the notice which has been given with respect to this alteration, or else we must reject it." The chairman may have misunderstood what was said to him by the legal adviser, which probably was only that he could not put any resolution which was not within the scope of the notice calling the meeting; but this amendment proposed by Mr. *Henderson* was within the notice calling the meeting, and therefore might properly be put before the meeting for consideration.

I think, then, that the chairman was entirely wrong in refusing to put the amendment, and that the resolutions which were passed cannot be allowed to stand, because the chairman, under a mistaken idea as to what the law was which ought to have regulated his conduct, prevented a material question from being brought before the meeting.

But then it was said that Mr. *Henderson* had waived his objection, for that he had acquiesced in the chairman's ruling. I think that is not so. The meeting was called to consider this proposal. The chairman ruled that he could not allow Mr. *Henderson's* amendment to be put to the meeting, and that the meeting must either take the proposed resolutions as they were without any amendment, or reject them altogether; and then Mr. *Henderson* votes for the rejection. That, in my opinion, was not acquiescing in the ruling of the chairman; it was only saying, "I cannot withstand the chairman, so I shall vote against these resolutions which are put before the meeting without any possibility of amendment."

I think, therefore, that on this point the Plaintiff is right, and I cannot agree with Mr. Justice *Chitty's* view. I think it is impossible to say, that after a chairman has consulted a legal adviser and has ruled in a certain way, a shareholder is bound to get up and say, "I object to that ruling; and I now, notwithstanding your ruling, tender this amendment, which I ask you to put to the meeting."

FRY, L.J.:—

I am entirely of the same opinion. I look upon what took place at the meeting as amounting to this, that Mr. *Henderson*

was desirous of moving one or other of two amendments. The one which he preferred was the one introducing terms with regard to the qualification of the directors, and the other was to strike out the proposal with regard to the qualification of shareholders. The chairman ruled that the first of those was out of order; and in so ruling, I think he was right. Then Mr. *Henderson* moved the other, viz., the omission of the proviso with regard to the six months' holding of shares; and so completely did the chairman understand that to be the case, that he invited any proprietor present to second it, and it was seconded accordingly; and not only that, but the chairman rose to put it to the meeting, and he explained what he was going to do. It was an amendment, to use his own language, with regard to the term of six months. He went on to explain the nature of the amendment, and then suddenly he objected to it because it was to alter what was from the first one of the conditions in the deed of settlement. I think, therefore, that there was an amendment moved, seconded, and about to be put to the meeting by the chairman, and I do not think there was any serious ambiguity as to what was the nature of that amendment. If the chairman had felt any difficulty with regard to it, it was his duty to invite Mr. *Henderson* to express himself more explicitly; and if Mr. *Henderson* had declined to do so, then it might well be that the chairman would have been justified in refusing to put it to the meeting; but there was no misunderstanding of that sort. Then, unfortunately, some one intervenes—apparently, from what occurs afterwards, the legal adviser of the company—and tells the chairman that no amendment can be put, and, therefore, that the alternative amendment of Mr. *Henderson*—to which, thus far, no objection had been taken by the chairman—could not be put any more than the other; and accordingly the chairman says, he finds that the proposal of Mr. *Henderson*, with regard to the six months, is *ultrà vires*, and he declines to put it.

Now I think that was an entire error. Neither Mr. *Rigby* nor Mr. *Maclean* has attempted to justify the correctness of that ruling—and it was a ruling of a very serious description with regard to a meeting of this character. The meeting was called to consider certain proposed amendments in the deed of settlement,

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and to conduct it on the plan that no amendment should be proposed to any of the proposals, so that each resolution should be taken as it stood or rejected, was to conduct the meeting under a very serious misapprehension of the rights of the shareholders and of their powers of discussion.

Then the Respondents contend, that the chairman's ruling ought to have been challenged, that he ought to have had a *locus penitentiæ*, and that a bill of exceptions, if I may be allowed to say so, ought to have been tendered to his ruling. But even if that were so, which I do not think it was, a further discussion took place on the point, because a proprietor asked this question: "Am I to understand that the only course open to those who agree with the proposed amendment is to reject the amendment now, and to reserve it for a future meeting? Why should we not vote upon it now?" That seems to be the very point, and then the chairman insists upon his view, and finally he tells them in explicit terms that nothing can be done now except to accept or reject the proposals now suggested. Therefore there was a challenge, not by Mr. *Henderson*, but by another proprietor, of the ruling of the chairman, and he adheres to it.

Now I am distinctly of opinion that it was not necessary for the shareholders to impeach the ruling of the chairman after it had been once deliberately made; and, in my opinion, Mr. *Henderson* would not have been acting properly if he had challenged it again. Then it follows that the chairman, without any right, refused to put a legitimate and germane amendment.

Then it is said that Mr. *Henderson* had acquiesced in the ruling and lost his rights. But I think there was no acquiescence at all. He insisted on his right to move this amendment, and the chairman ruled that it could not be done. It was not for him to keep up an altercation with the chairman, nor would he lose his right by acting under the ruling of the chairman.

I think, therefore, that the resolutions were carried at a meeting improperly conducted, for that the shareholders had a right, and should have been allowed, to move amendments, and that as this particular amendment was not put in consequence of the unfortunate ruling of the chairman—a ruling which I am bound to say seems to me to have been against his own judgment—these

resolutions cannot stand, and, consequently, this appeal must be allowed.

LOPES, L.J.:—

The first question is, whether the notice was sufficient; but it is unnecessary to decide that question, because the view that we take with regard to the other matter determines the case. I desire, however, to say for myself that I have doubts whether that notice was sufficient—whether it sufficiently conveyed to the shareholders the knowledge of an intention to propose any alteration in the qualification.

It has been urged as one ground why the proceedings were not irregular that there was no definite amendment put forward by Mr. *Henderson*. Now, I can quite imagine circumstances where it would not be necessary that there should be any definite amendment. Suppose a shareholder says, "I propose to move an amendment," and the chairman says, "I am perfectly clear that no amendment can be moved, and I will not put any amendment." It would be absurd in such a case as that to say that the shareholder is bound to tender some definite amendment. But I think that in the case before us there was a definite amendment, and an amendment which it is not at all difficult to understand. The amendment in effect, to my mind, was this: that the provision with regard to the registration for six months of the shareholders should be omitted. I think that from the shorthand writer's note, when it is carefully read, it is perfectly clear that that was the amendment which Mr. *Henderson* wanted to move, and which in point of fact he did move. I think it was so understood by the chairman; and I have no doubt in my own mind that it was so understood by the shareholders present. It is perfectly true that in the first instance he wished to move that the directors must have held their shares for a certain period; but the chairman ruled, and I think properly ruled, that that would be *ultrà vires*. It seems to me that Mr. *Henderson* then abandoned that proposal, and proceeded to move in terms sufficiently clear for any one to understand the proposed amendment to which I have alluded. The chairman refused to put it. The question is, whether that refusal by the chairman

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invalidates these proceedings. It is, to my mind, perfectly clear that it does.

Then it is said that there was an acquiescence by Mr. *Henderson*. I am bound to say that I can see no evidence at all of any acquiescence by Mr. *Henderson*; I think, on the contrary, that he resisted the action of the chairman as far as he decently could.

Then it is said that he ought to have challenged the ruling of the chairman. This is an entirely new proposition to me. I think that when a chairman deliberately rules that a certain amendment cannot be put, it would be improper and indecent for any shareholder to proceed to discuss the propriety of the chairman's ruling. Of course, I am assuming that he gives his ruling deliberately, and having the matter sufficiently before him. Mr. *Rigby*, I think, said that the proper course for Mr. *Henderson* to take, when this amendment was not put, would have been to walk out of the room. I cannot understand that. I think Mr. *Henderson* was quite justified in remaining in the room and voting upon the resolution which was put. I think the decision of the learned Judge below was wrong, and that this appeal should be allowed.

Solicitors: *Dawes & Sons*; *Farrer & Co.*

H. C. J.

WINDHILL LOCAL BOARD OF HEALTH *v.* VINT.

[1889 W. 2578.]

C. A.
1890
STIRLING, J.
March 11, 12; *May* 13.
C. A.
July 17.

Illegal Contract—Stifling Prosecution—Indictment for obstructing Road.

The Plaintiffs, who were a local board, brought an indictment against the Defendants for interfering with and obstructing a public road. At the trial of the indictment an agreement for compromise was made between the solicitors of both parties, and sanctioned by the Judge, and was afterwards confirmed by a deed executed by the Plaintiffs and Defendants. By this deed the Defendants covenanted to restore the road, which they had broken up, within seven years, and the Plaintiffs covenanted that when that had been done they would consent to a verdict of "not guilty" on the indictment. The Defendants failed to restore the road, and the Plaintiffs then brought an action on their covenant, claiming specific performance and damages:—

Held (affirming the judgment of *Stirling*, J.), that as the indictment was for a public injury, the agreement to consent to a verdict of "not guilty" was against public policy and illegal, and the Plaintiffs could not maintain an action on the Defendants' covenant. The action was therefore dismissed.

Keir v. *Leeman* (1) followed.

Dictum of *James*, L.J., in *Fisher & Company* v. *Apollinaris Company* (2) not followed.

THIS was an action by the Local Board of Health of *Windhill*, in the county of *York*, for specific performance of covenants in a deed dated the 9th of November, 1880, and for damages for breach of them by the Defendants. The Defendants pleaded that the covenants were entered into for an illegal consideration.

In the month of March, 1880, the Plaintiffs presented an indictment at the assizes at *Leeds* against the Defendants, who were stone merchants, for interfering with a highway called *Gaisby Lane*, by excavating a stone quarry, and also for obstructing a public footpath. The indictment came on for trial on the 4th of August, 1880, when the Defendants pleaded "not guilty." On the same day a memorandum in writing was drawn up by the solicitors on both sides, and marked with the initials of the counsel engaged, to the effect that it was agreed (subject to the

(1) 6 Q. B. 308; 9 Q. B. 371. (2) Law Rep. 10 Ch. 302.

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approval of the Court) between the Plaintiff Board and the Defendants, among other things, that the Defendants should, within seven years from that date, restore *Gaisby Lane* in manner therein mentioned, to the satisfaction of the borough surveyor for the time being. And it was also agreed that the said indictment should lie in the office as a security for the observance of the terms therein stated, which should also, if required by either party, be embodied in a deed between the Plaintiff Board, *George Vint*, who was the lessee under whom the Defendants held their quarries, and the Defendants, and that when the said terms were fulfilled a verdict of "not guilty" should be consented to by the Plaintiff Board.

The Judge approved the terms contained in the memorandum, and ordered that the indictment should lie in the office accordingly.

An indenture dated the 9th of November, 1880, was afterwards made and executed between the Defendants of the first part, *George Vint*, of the second part, and the Plaintiff Board of the third part. It recited the indictment, and that the Defendants pleaded "not guilty" thereto; and recited the memorandum of the 4th of August, 1880, and that on the trial of the said indictment the Court approved of the said terms, and ordered that the indictment should lie in the office accordingly, and that the said parties thereto had agreed to execute the deed for the purpose of confirming the terms of the compromise, and carrying the same into effect in manner thereafter appearing; and it was witnessed among other things, that the Defendants covenanted "that they, or one of them, their trustees, executors, or administrators, should, and would, within the term of seven years, to be computed from the 4th day of August, 1880, restore the public highway called *Gaisby Lane*, which was delineated and coloured pink on the plan thereto annexed, and in the lines marked on the said plan, and would make such highway or road of the uniform width of ten yards at the least." This covenant carried out the terms contained in the memorandum of the 4th of August, 1880. The deed also contained a covenant by the Plaintiff Board "that when and so soon as the stipulations and conditions thereafter contained have been fulfilled, the said Local Board will consent

to a verdict of 'not guilty' being entered upon the said indictment."

The Defendants failed to perform the covenants contained in the deed, and the Plaintiff board accordingly brought the present action, claiming specific performance of the said covenant, to restore the public highway called *Gaisby Lane*, or damages in the alternative.

The Defendants in their statement of defence, among other defences, pleaded that the consideration for the performance by them of the stipulations contained in the indenture of the 9th of November, 1880, was the covenant by the Plaintiff board that, so soon as the stipulations have been fulfilled, they would consent to a verdict of "not guilty" being entered upon the indictment; and that the consideration was illegal, and the covenants contained in the deed wholly null and void.

The action came on for trial before Mr. Justice *Stirling* on the 11th of March, 1890.

Hastings, Q.C., and *Bardswell*, for the Plaintiffs:—

It is suggested that the agreement which was come to was void, as being for an illegal consideration; but in *Fisher & Company* v. *Apollinaris Company* (1) it was held that where an offence was of such a nature that the offender might be proceeded against either civilly or criminally, there was nothing illegal or improper in a compromise; and there has been no compromise in this case of the criminal proceedings taken here. There can be no difficulty in ordering the Defendants to specifically perform their agreement to restore the public highway, and to make it uniform in width with the other part of the road which people have to walk, ride, and drive over: *Bidwell* v. *Holden* (2). If it should be held that there is no jurisdiction to order the Defendants to restore the road, then the Plaintiffs are clearly entitled to damages for breach of the contract.

[The *Highway Act*, 1835 (5 & 6 Will. 4, c. 50, s. 84), was referred to.]

Fischer, Q.C., and *R. Cunningham Glen*, for the Defendants:—

The agreement was founded upon an illegal consideration, and

(1) Law Rep. 10 Ch. 297. (2) W. N. 1890, p. 45.

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is therefore void; moreover, it was an agreement not capable of being specifically performed, and the Plaintiffs have not suffered any damage. The consideration was an agreement to compromise an offence of a public nature, and was consequently clearly illegal, and it was not and could not be made legal by the approval given by the Court at the time. The object of the agreement was to stifle a prosecution: *Keir* v. *Leeman* (1); *Johnson* v. *Ogilby* (2); *Williams* v. *Bayley* (3).

[STIRLING, J., referred to *Fallowes* v. *Taylor* (4).]

That case was overruled by *Keir* v. *Leeman.*

[STIRLING, J., referred to the judgment of Lord Justice *James* in *Fisher & Company* v. *Apollinaris Company* (5), where his Lordship said: "It was no more a violation of the law to accept an apology in such a case than it would be to compromise an indictment for a nuisance, or for not repairing a highway on the terms of the defendants agreeing to remove the nuisance or repair the highway."]

That *dictum* cannot overrule the express decision of the Court of Exchequer Chamber; and, further, it is answered by the observations of the same learned Judge in the case of *Whitmore* v. *Farley* (6), where *Keir* v. *Leeman* was referred to with approval. The compromise of the prosecution must be considered to have been complete at the time when the agreement was executed: *Reg.* v. *Burgess* (7). The action ought to be dismissed, and with costs.

Hastings, in reply:—

I submit that the decision in *Keir* v. *Leeman* does not apply to this case, because there was no acquittal of the Defendants, and no forbearance on the part of the Plaintiffs, except that the trial was adjourned with the consent of the Judge. No case has been cited which has impeached the validity of an agreement where the indictment was ordered to remain in the office in order to see whether the Defendant was going to purge his offence.

(1) 6 Q. B. 308; 9 Q. B. 371.
(2) 3 P. Wms. 277.
(3) Law Rep. 1 H. L. 200, 213.
(4) 7 T. R. 475.
(5) Law Rep. 10 Ch. 302.
(6) 29 W. R. 825.
(7) 16 Q. B. D. 141, 144.

The only object of the indictment was to have the law obeyed; that was also the object of the agreement; that was not a shifting of the prosecution. The decision in *Fallowes* v. *Taylor* (1) is still binding, and so is the judgment in *Fisher & Company* v. *Apollinaris Company* (2). There is no contradiction by that case of *Whitmore* v. *Farley* (3), which was a case of compounding a felony.

[The following cases were also referred to: *Gervais* v. *Edwards* (4); *Blackett* v. *Bates* (5); *South Wales Railway Company* v. *Wythes* (6); *Rolls* v. *Vestry of St. George the Martyr, Southwark* (7); *Mosely* v. *Virgin* (8); *Davies* v. *Underwood* (9).]

STIRLING, J. (after stating the facts, continued):—

It was admitted by the Defendant *Samuel Walker Vint*, in answer to questions put by his own counsel, that, in 1880, he and his brother were working the quarry on the site of the road, and that consequently there was no real defence to the prosecution; and if the Defendants had either pleaded guilty or been found guilty, different courses might have been taken which would substantially have had the effect of securing that which the Plaintiffs have attempted to secure by means of the deed. It appears from the case of *Rex* v. *Incledon* (10), that when a defendant upon such an indictment has been found guilty, judgment may be postponed, and if it appears to the Court that the defendant has, when the case comes on for judgment, sufficiently repaired the highway in the meantime, so as to abate the nuisance, a merely nominal fine may be inflicted, and the defendant may be discharged. That was one of the courses that might have been taken. Another course might have been taken under the statute 5 & 6 Will. 4, c. 50, s. 96, which provided that no fine, issue, penalty, or forfeiture for not repairing the highway, or not appearing to any indictment for not repairing the same, should thereafter be returned into the Court of Exchequer or other

(1) 7 T. R. 475.
(2) Law Rep. 10 Ch. 297.
(3) 29 W. R. 825.
(4) 2 D. & War. 80.
(5) Law Rep. 1 Ch. 117.
(6) 1 K. & J. 186; 5 D. M. & G. 880.
(7) 14 Ch. D. 785.
(8) 3 Ves. 184.
(9) 2 H. & N. 570.
(10) 13 East, 164.

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Court, but should be levied by and paid into the hands of such person residing in or near the parish where the road should lie as the justices or Court imposing such fines, issues, penalties, or forfeitures should order and direct to be applied towards the repair and amendment of such highway. So that it would have been possible to inflict a fine of sufficient amount to secure the repair and amendment of the highway, and it might have been effectually so applied. Then a third course was open, namely, that the Court might have considered that the case was one in which a fine ought not to be imposed, but that a sterner penalty ought to be inflicted. It would lie with the Court to determine which course should be taken. I cannot think that there is any ground for supposing that it was intended by the agreement of the 4th of August, 1880, to do anything that was unlawful. I believe that that agreement was come to solely in order to avoid the appearance of harsh conduct on the part of the public body which instituted the proceedings. I have no doubt that the facts were fully brought to the knowledge of the presiding Judge, and I think that his approval, given under such circumstances, was strong evidence of the good faith of the parties. Nevertheless, neither the good intentions of the prosecutor and Defendant, nor the approval of the Judge, can avail if, in fact, the consideration for the agreement was illegal; *Keir* v. *Leeman* (1). Now, part of the consideration for the promise of the Defendants was the agreement of the Plaintiffs (the prosecutors in the indictment), that when and so soon as the stipulations thereinbefore contained had been fulfilled, they would consent to a verdict of "Not guilty" being entered on the indictment. It was contended that that was not a lawful promise. In the case of *Fallowes* v. *Taylor* (2), a bond was given to an individual conditioned to be void if the obligor (on the obligees agreeing not to prosecute him) should remove certain public nuisances, and not erect any others of the same kind. The plaintiff, to whom the bond was given, was clerk of the peace for the county of *Hereford*, who had been directed by the magistrate to prosecute all persons who erected, kept, or maintained certain walls, cribs, and other nuisances in and upon the river *Wye*, in order to preserve the

(1) 6 Q. B. 308; 9 Q. B. 371. (2) 7 T. R. 475, 477.

navigation, and in pursuance of such orders he had prepared bills of indictment against the defendant, the obligor, who, in order to avoid the expense of the indictment, had applied to the plaintiff not to prefer the same upon condition that he the defendant should enter into a bond to remove the nuisance. The defendant did not fulfil the condition of the bond, and an action was brought and tried at the *Hereford* Assizes before Lord *Kenyon*, when the plaintiff obtained a verdict. The defendant moved in arrest of judgment on the ground that the contract disclosed in the condition of the bond was an illegal contract, and could not be enforced in a Court of justice. The Court held that they could not arrest the judgment. Lord *Kenyon* said: "The want of a consideration to a bond affords no ground of objection; and if there were anything illegal in this consideration, the defendant should have pleaded it." I am not altogether sure whether that is quite in accordance with the law as it now stands; in some cases, at least, it may be the duty of the Court to raise the objection, and refuse to be party to enforcing an illegal agreement, even though the defendant may not have raised the question by his pleadings: see *Whitmore* v. *Farley* (1). Mr. Justice *Lawrence* said: "The defendant might have given a bond to the plaintiff without any consideration at all: and why may he not give a bond for a consideration that is legal?" So that it is clear, at all events, that the opinion of Mr. Justice *Lawrence* was that the consideration was legal. That case came to be considered, and was commented on, by the Court of Exchequer Chamber in the case of *Keir* v. *Leeman* (2), which is the leading authority on the subject; and there Chief Justice *Tindal*, in delivering the judgment of the Court, said: "It seems clear, from the various authorities brought before us on the argument, that some misdemeanours are of such a nature that a contract to withdraw a prosecution in respect of them, and to consent to give no evidence against the parties accused, is founded on an illegal consideration. . . . It is strange that such a doubt should ever have been raised. A contrary decision would have placed it in the power of a private individual to make a profit to himself by doing a great public injury." Then after referring to various cases,

(1) 28 W. R. 908; 29 W. R. 825. (2) 9 Q. B. 392–5.

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he said, "In *Drage* v. *Ibberson* (1), however, Lord *Kenyon* adverted to, and stated that he should adhere to the class of cases which held that the consideration for an agreement, being the settling of a misdemeanour, might be good in law. Thus a settlement of an indictment for a nuisance preferred by public authority, was held a lawful consideration for a bond binding the defendant to remove the nuisance; we presume, on the ground, which however is not very satisfactory, that the main object of the prosecution, the removal of the nuisance, was thereby effected. But the Court seem to have overlooked the consideration that a defendant who had infringed a public right was thereby entirely freed from the punishment due to a violation of public law. In *Edgcombe* v. *Rodd* (2) Mr. Justice *Le Blanc* assigns this as a reason for the consideration being illegal, that there the prosecution was for a public misdemeanour and not for a private injury to the prosecutor. It is difficult to reconcile this principle, which we think a just one, with the decision in *Fallowes* v. *Taylor* (3); nor can *Pool* v. *Bousfield* (4) be reconciled with it. There an agreement to stifle a motion against the defendant, that he should answer the matters of an affidavit, was held illegal." Then he went on to distinguish the class of cases which do not break in upon sound principles, and said: "These are cases where the private rights of the injured party are made the subject of agreement, and where, by the previous conviction of the defendant the rights of the public are also preserved inviolate;" and later on he said: "Indeed it is very remarkable what very little authority there is to be found, rather consisting of *dicta* than decisions, for the principle, that any compromise of a misdemeanour, or indeed of any public offence, can be otherwise than illegal, and any promise founded on such a consideration otherwise than void. If the matter were *res integra* we should have no doubt on this point. We have no doubt that, in all offences which involve damages to an injured party for which he may maintain an action, it is competent for him, notwithstanding they are also of a public nature, to compromise or settle his private damage in any way he may

(1) 2 Esp. 643.
(2) 5 East, 294.
(3) 7 T. R. 475.
(4) 1 Camp. 55.

think fit. It is said, indeed, that in the case of an assault he may also undertake not to prosecute on behalf of the public. It may be so: but we are not disposed to extend this any further." There is a third case to which it is right that I should refer: *Fisher & Company* v. *Apollinaris Company* (1). That was a case arising out of the infringement of a trade-mark, where the owners had prosecuted the alleged infringer criminally. The prosecutors offered no evidence against the offender, who was acquitted upon giving to the prosecutors a letter of apology with authority to make such use of it as they might think necessary. The prosecutors published this letter by advertisements, and continued to do so for nearly two months. It was held that the arrangement as to the apology was not void as made under duress, and that the prosecutors could not be restrained from publishing the letter. In the course of his judgment Lord Justice *James* (2) said: "This is one of those misdemeanours where the person injured has the choice between a civil and a criminal remedy. It was no more a violation of the law to accept an apology in such a case than it would be to compromise an indictment for a nuisance or for not repairing a highway on the terms of the defendants agreeing to remove the nuisance or repair the highway. Offences of this kind are indictable, but it is not against the policy of our law to allow the injured party to enter into a compromise with regard to them." No one can feel greater respect than I do for anything that fell from that learned Lord Justice; but it appears to me that there are two circumstances in the case which render his *dictum* less weighty than it otherwise would be. In the first place, the remark with reference to the compromise of the indictment was made incidentally, and not after a consideration of the cases to which I have referred. The case of *Keir* v. *Leeman* (3) was not cited at all. And, secondly, it is to be observed that Lord Justice *Mellish* did not express his concurrence in what was thus laid down. Lord Justice *Mellish* (4) said: "Now, previously to the *Trade Marks Act* (25 & 26 Vict. c. 88), the sole remedy for the wrong complained of by the company would have been by action at law or suit in equity, but

(1) Law Rep. 10 Ch. 297.
(2) Ibid. 302.
(3) 6 Q. B. 308; 9 Q. B. 371.
(4) Law Rep. 10 Ch. 303.

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under this Act the wrong became also the subject of a criminal prosecution. There was no authority for saying that it was wrong in the prosecutors to withdraw from such a charge of this kind. The prosecutors allowed him to state that his offence was not wilful, and accepted an apology. Such compromises are constantly made before criminal Courts in cases of assault or libel." He said nothing about the case of an indictment for not repairing a highway. Notwithstanding, therefore, the weight due to the observations of Lord Justice *James*, I consider myself bound to follow the principle laid down by Chief Justice *Tindal*, "that any compromise of a misdemeanour, or, indeed, of any public offence, cannot be otherwise than illegal." That principle his Lordship evidently considered extended to the compromise of an indictment for nuisance when the public right was violated. In the present case the subject-matter of the compromise was not a private right, but a public right. The prosecutors were a public body, seeking to enforce the rights of the public in respect of a highway. The acts complained of by the prosecution constituted a misdemeanour and a public offence. The stipulation which formed the consideration for the promise of the Defendants was one to consent to a verdict of "not guilty," being—whatever may be thought of its form—in substance an engagement having a tendency to affect the administration of public justice, and this, as was laid down by Lord *Lyndhurst* in *Egerton* v. *Earl Brownlow* (1), is illegal and void. I come, therefore, with great reluctance, to the conclusion that the contention of the Defendants that the consideration was illegal is well founded; but such is my opinion of their conduct that though I am compelled to dismiss the action, I, under the circumstances, do so without costs.

T. F. M.

C. A. From this judgment the Plaintiffs appealed. The appeal was heard on the 17th of July, 1890.

Hastings, Q.C., and *R. S. Wright* (*Bardswell*, with them), for the Appellants:—

The agreement which was made at the trial of the indictment

(1) 4 H. L. C. 1, 163.

and the deed which was based on it were not illegal. There was nothing contrary to public policy in the covenant to consent to a verdict of "not guilty" if the Defendants performed their part of the agreement. It is a matter of common occurrence that on an indictment against a public body for non-performance of a duty a verdict of "guilty" is taken by consent, and judgment is postponed in order to give the Defendants the opportunity of performing their duty, in which case they are never called up for judgment. If that course is legal, why is the course which was pursued in the present case, which differs from it only in form, and which received the sanction of the judges, illegal? It is very different from a case in which the prosecutor compromises a prosecution to give a personal benefit to himself. No doubt that is against public policy, and it is to such a case that the expression "stifling a prosecution" properly applies: *Wallace* v. *Hardacre* (1). But if the injury is a public one, and the prosecutor consents to a compromise in order to obtain a benefit to the public, such a course is not open to the same objection, and has been often upheld: *Williams* v. *Bayley* (2); *Fisher & Company* v. *Apollinaris Company* (3); *Fallowes* v. *Taylor* (4); *Wandsworth Board of Works* v. *United Telephone Company* (5); *Coppock* v. *Bower* (6); *Ex parte Dobson* (7). There is nothing in *Keir* v. *Leeman* (8) that is opposed to this view. In the present case there was no bargain for any personal benefit; the public benefit was alone considered in the compromise.

Again, there is nothing against public policy in compromising a prosecution if the compromise secures the very object for which the prosecution was commenced. Such a compromise is only illegal if the intention or necessary effect is to prevent the object of the prosecution being attained. If the object of an indictment is to punish the offender, it may be against public policy to stifle it; but prosecutions such as the present are brought, not with the object of imprisoning the Defendants, but of forcing them to perform some public duty; and if by the compromise the

(1) 1 Camp. 45.
(2) Law Rep. 1 H. L. 200, 213.
(3) Ibid. 10 Ch. 297.
(4) 7 T. R. 475.
(5) 13 Q. B. D. 904.
(6) 4 M. & W. 361.
(7) 11 W. R. 330.
(8) 6 Q. B. 308; 9 Q. B. 371.

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performance of the public duty is secured, it cannot be against public policy. There would have been nothing against public policy if the prosecution had been dropped in consequence of the Defendants having reinstated the road; how then can it be illegal to agree to drop it in a similar event? *Reg.* v. *Paget* (1); *Chitty* on Criminal Law (2).

The agreement to consent to a verdict of "not guilty" was not an agreement to stop the prosecution, but only to postpone it. The agreement would not bind the judge when the indictment came on again. If he thought public justice had been interfered with, or that the Defendants deserved punishment, the Judge might refuse to enter the verdict and might inflict punishment: *Johnson* v. *Ogilby* (3); *Collins* v. *Blantern* (4); *Edgcombe* v. *Rodd* (5); *Reg.* v. *Hardey* (6); *Flower* v. *Sadler* (7).

Fischer, Q.C., Sir *Horace Davey*, Q.C., and *R. Cunningham Glen*, for the Defendants, were not called on.

COTTON, L.J.:—

This is an appeal from a judgment of Mr. Justice *Stirling* dismissing the action on the ground that the agreement sued upon was an illegal one, and that it was an agreement to stifle, to use the word that is so commonly used, a prosecution.

I do not intend to enter at all into the question whether an agreement to stifle any prosecution is illegal or not. That does not arise here, because this was merely a prosecution on a public matter—a matter which concerned the public. It was an interference with the public highway in a very serious manner; and this agreement was made to postpone the prosecution for a considerable time, and that could only of course be done with the consent of the Judge. There was an agreement that, upon certain acts being done by the Defendants who were prosecuted, the prosecutors would not object to a verdict of "not guilty." Now, how was the course which was adopted dealt with and defended by the counsel for the Appellants? As I understood

(1) 3 F. & F. 29.
(2) 2nd Ed., pp. 4, 489.
(3) 3 P. Wms. 277.
(4) 1 Sm. L. C. (9th Ed.) 398.
(5) 5 East, 294.
(6) 14 Q. B. 529.
(7) 10 Q. B. D. 572.

Mr. *Graham Hastings*' argument, he said that if there was no money received for the private benefit of the prosecutor, or of any other individual, such an agreement was not illegal. And it was also said by Mr. *R. S. Wright*, and I think that was the more reasonable argument, that such an agreement would not be illegal unless the agreement had for its object the preventing effect being given to, or the object being attained by, the prosecution. It is impossible, in my opinion, to accede to Mr. *Graham Hastings*' argument. To my mind, what he contends for comes within the mischief. But I must say this further, I cannot accede to the argument addressed to us by Mr. *Wright*. I put it to him whether he could find any authority in favour of such an agreement being legal, and he very fairly admitted that he could not. But he said that must be the reason of the rule. To my mind, the reason of the rule goes deeper than that; it is this, that the Court will not allow as legal any agreement which has the effect of withdrawing from the ordinary course of justice a prosecution when it is for an act which is an injury to the public. It would be the case of persons taking into their own hands the determining what ought to be done; and that ought not to be taken into the hands of any individuals, even if they are a *quasi* public body like the Plaintiffs here, but ought to be left to the due administration of the law, and to the Judges, who can determine what in the particular case ought to be done. I think it goes beyond saying, that in the particular case there can be or cannot be any evil to the public; but you are taking the administration of the law, and the object which the law has in view, out of the hands of the Judge and putting it into the hands of a private individual. That to my mind is illegal.

I will not go into the authorities, but many of them have been referred to. They do not lay down that view definitely I agree; but that must be the principle upon which the cases are decided.

I think I need hardly refer to the case of *Keir* v. *Leeman* (1); but it is laid down there that stifling a prosecution for a public object is illegal, even though in the individual case it could be shewn that there was no injury to the public because it takes the administration of the law out of the hands of those to whom it

(1) 6 Q. B. 308; 9 Q. B. 371.

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is committed, namely, the Judges, and puts it into the hands of a private individual to determine what shall be done in the particular case. Here it was also argued that there was no stifling of the prosecution; but I think that "stifling" means this, the preventing the prosecution which has been instituted being conducted in the ordinary course. I think here this certainly does so; because not only does it postpone it, but there is an agreement by the prosecutors that certain things shall be done. I will not enter into the question whether that is all that was to be done or not; but if certain things are done, the prosecutors who have taken the matter into their hands would not object to a verdict of "not guilty."

In my opinion, the decision of Mr. Justice *Stirling* was right, and the appeal must be dismissed.

FRY, L.J.:—

In this case the contract provided that the indictment which was pending should lie in the office, in the language of the agreement, for the term of seven years, and that when the terms of the agreement were fulfilled a verdict of "not guilty" should be consented to by the local board. In my judgment, that is an agreement to stifle the prosecution—that is to say, an agreement to put an end to it in a manner which does not depend upon the ordinary course of law. It is to be put an end to in a certain contingency by consent.

Now, I confess it appears to me that the law upon this point is determined by the case of *Keir* v. *Leeman* (1). That lays down this principle, which I take to be one of general application, that where the matters of indictment are matters of public concern, they are not the subject of compromise. To use the language of the learned Judge who delivered the judgment in the Court of Queen's Bench (2): "These are matters of public concern, and therefore not legally the subject of a compromise." And the same was laid down when the case came before the Court of Exchequer Chamber. There the Chief Justice of the Common Pleas, who delivered the judgment (3), said: "In the case before

(1) 6 Q. B. 308; 9 Q. B. 371. (2) 6 Q. B. 322.
(3) 9 Q. B. 395.

us, the offence is an assault coupled with riot and the obstruction of a public officer. No case has said that it is lawful to compromise such an offence."

I think, therefore, that the whole inquiry is this, whether the subject of the indictment in the present instance is a matter of general public concern. That question, it appears to me, must be answered in the affirmative. Therefore, upon the principle of that case, the decision of Mr. Justice *Stirling* was correct.

But then two arguments are addressed to us. It is said that the principle does not apply where the benefit secured by the agreement is a benefit to the public, and not to some private individual. I am of opinion that no such exception can be made. If that exception were valid, it would seem to follow that a prosecution for manslaughter, or, for aught I know, for murder, could be validly compromised with the prosecutor on an agreement that the defendant should pay £1000 to the Chancellor of the Exchequer, because that would be a consideration for the public benefit; but I do not think that the prosecutor is at liberty to weigh the advantage to the public in continuing the prosecution against the advantage of some sum of money being paid to the public or of something else being done for the public, and that he has no right to put those two things into the balance and determine in favour of the one as against the other.

Then it is argued by Mr. *Wright* that there is another exception to the rule, and it is this, that if the stipulation in the contract is to the same effect as the object of the prosecution, or, in other words, if the object of the prosecution is carried into effect by the terms of the contract, the contract is valid, and the compromise is good. It must be admitted that no case can be produced in support of that contention, nor does it appear to me in principle to be sound; because the result of it is to remove from the ordinary administration of law the decision of a question which was pending before it. To illustrate it by the present case, if this case had taken the ordinary course it would have been for the learned Judge before whom the Defendants might be brought to pass sentence to determine what was to be done with them, and if he thought a serious outrage had been done to public rights, he might have shewn his sense of the

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impropriety and wrongfulness of the Defendants' conduct by fine or by imprisonment. Now that whole power which would be vested in the Judge before whom, after the adjournment, the case might come, is taken away from that Judge, so far as the contracting parties could take it, by one consenting that a verdict of not guilty should be entered. We have therefore a case in which a contract is entered into for the purpose of diverting—I may say perverting—the course of justice; and, although I agree that in this case it was entered into with perfect good faith and with all the security which could possibly be given to such an agreement, I nevertheless think that the general principle applies, and that we cannot give effect to the agreement, the consideration of which is the diverting the course of public justice. For these reasons, I think the appeal fails.

LOPES, L.J.:—

I entirely agree with the judgments which have been delivered, and have but a very few words to add.

As a general principle, it may be stated that it is the duty of every prosecutor where the public are interested to prosecute either to conviction or to acquittal. Again, it may be stated as a general principle that it is inexpedient to stop the course of the law in a criminal matter where a public right is involved—that it is inexpedient to take out of the hands of the law and commit to an individual the determining of what is to be done in a particular case. Those being general principles with regard to the present case, I have only to state that in my opinion this case falls well within the decision of *Keir* v. *Leeman* (1), and I shall satisfy myself by merely citing the words at the end of Lord *Denman's* judgment. He said (2): "But, if the offence is of a public nature, no agreement can be valid that is founded on the consideration of stifling a prosecution for it." Now, there can be no doubt that in the present case the offence was of a public nature; and, in my opinion, the consideration for the agreement which was entered into, was the consent to an acquittal in the future, which seems to me in effect to be a stifling of a prosecution.

(1) 6 Q. B. 308; 9 Q. B. 371. (2) 6 Q. B. 321.

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I think that the agreement in question was against public policy and illegal, and that therefore the appeal should be dismissed.

Solicitors for Plaintiffs: *Jaques & Co.*, agents for *Lancaster & Wright, Bradford.*

Solicitors for Defendants: *W. & J. Flower & Nussey*, agents for *Killick, Hutton, & Vint, Bradford.*

M. W.

In re EASTERN AND MIDLANDS RAILWAY COMPANY.

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KAY, J.
June 28; *July* 1, 2.
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Railway Company—Receiver and Manager—Application of Moneys in hands of Receiver—"Working Expenses and Proper Outgoings"—Railway Companies Act, 1867 (30 & 31 *Vict. c.* 127), *ss.* 4, 23 [*Revised Ed. Statutes, vol. xv., pp.* 598, 601].

When a receiver of the undertaking of a railway company has been appointed in pursuance of sect. 4 of the *Railway Companies Act*, 1867, the moneys received by him must be applied first in providing for the "working expenses" of the railway, even if by the company's special Act a fixed dividend on shares and the interest on debentures, forming the capital raised for a particular undertaking of the company, are charged on the gross receipts of that undertaking:—

When a railway company has purchased rolling stock on the terms of paying for it by a series of instalments at fixed times, the stock not becoming the property of the company until the complete payment of all the instalments, and the vendor having the right to seize the stock on default in payment of any one instalment, the "working expenses" include such instalments as they become due, and also overdue instalments.

By virtue of a special Act of a company a certain loop line was constituted a "separate undertaking," and the capital raised for the purpose of constructing the loop line was constituted "separate capital." A receiver having been appointed under sect. 4 of the *Railway Companies Act*, 1867:—

Held (by *Kay*, J., and the Court of Appeal), upon the construction of the special Act as a whole, that the dividend upon, and interest in respect of, the separate capital were not "working expenses" or "proper outgoings" within the meaning of sect. 4, and were to be postponed to working expenses.

THIS case came before the Court upon two summonses.

The first summons was taken out by Messrs. *L. Heyworth* and

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A. L. Stride, who were the trustees of a deed, dated the 11th of October, 1884, and made between the *Eastern and Midlands Railway Company* of the one part and the trustees of the other part, asking that it might be declared that the Applicants were entitled to the tolls or sums payable as provided by certain resolutions passed by the company, and distinguished by the letters E and F, in priority to, and without any deduction for, any debts or expenses whatsoever of the company, and that the receiver and manager, who had been appointed by the Court on the 10th of July, 1889, might be ordered to render to the Applicants a weekly account of the tolls payable as provided by the resolutions E and F, and to pay to them weekly as aforesaid the full amount of such tolls as from the date of the last payment of the daily sum of £17 15*s.* 5*d.* payable under the trust deed.

The second summons was taken out by the railway company and the receiver and manager, and it asked that the latter might be at liberty to pay certain instalments of rent which, under certain contracts with the company, in respect of the hire by them of rolling stock, had become due on the 30th of June, 1889; and further, to make the payments of the further instalments as they should become due from time to time out of the receipts of the company as they should come in, and that the payments so made might be allowed to the receiver and manager on passing his accounts, and that he might also be at liberty to pay the rates on the property of the company through which the railway passed.

The *Eastern and Midlands Railway Company* was formed in 1882 by an Act (45 & 46 Vict. c. ccxxvii.) which vested in the company several undertakings authorized by previous Acts, and conferred further powers on the company in respect of those undertakings. One of those undertakings was a railway the construction of which was authorized by the *Lynn and Fakenham Railway Act*, 1882 (45 & 46 Vict. c. clxxix.), and was in that Act distinguished as Railway No. 1. This railway was afterwards designated the "*Lynn Loop Line*." The railway previously ran into *Lynn* with a sharp curve, and came out of *Lynn* again on the other side with a sharp curve. The loop line was a short line connecting these two curves outside *Lynn*, and making a

practically straight line outside *Lynn*, so that trains might be run along the main line without coming into *Lynn* at all.

In 1884 an Act was passed (47 & 48 Vict. c. xcvi.), called the *Eastern and Midlands Railway Act*, 1884. It received the Royal Assent on the 3rd of July, 1884.

This Act contained a recital that it would facilitate the raising of capital for the purposes of Railway No. 1, authorized by the *Lynn and Fakenham Railway Act*, 1882, if the company were empowered to constitute Railway No. 1 a separate undertaking with separate capital.

Sect. 6 provided that the company might apply for the purposes of the Act any money which they were already authorized to raise, and which might not be required by them for the purposes for which the same was authorized to be raised, and might also from time to time raise any additional sum or sums, not exceeding in the whole £100,000, by the issue at their option of new ordinary shares or stock, or new preference shares or stock, or partly by any one or more of those methods respectively, "which shares or stock shall form part of the general capital of the company." Sect. 10 empowered the company, in respect of the additional capital of £100,000, to borrow from time to time on mortgage of their undertaking any sum not exceeding in the whole £33,000. Sect. 12 authorized the company to create and issue debenture stock.

By sect. 13: "The principal money secured by all mortgages granted by the company in pursuance of the powers of any former Act, and subsisting at the time of the passing of this Act, shall, during the continuance of such mortgages, and subject to the provisions of the Acts under which the same were respectively granted, have priority over the principal money secured by any mortgages granted by virtue of this Act."

By sect. 14: "If the directors of the company at any time pass a resolution or resolutions to the effect that Railway No. 1, described in and authorized by the *Lynn and Fakenham Railway Act*, 1882 (hereinafter called the '*Lynn* loop line'), shall constitute a separate undertaking, and that the capital in shares or stock to be raised under this Act, or any part thereof, shall constitute a separate capital, and such resolution or resolutions be

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respectively confirmed at an extraordinary general meeting of the company convened with due notice of the matter, and by the votes of proprietors entitled to vote at any such meeting, present in person or by proxy, holding at least three-fourths of the paid-up capital represented at such meeting, then the *Lynn* loop line, together with all lands, buildings, and property to be purchased for the purposes thereof, shall form a separate undertaking, distinct and apart from the rest of the undertaking of the company, and the capital, to the extent stated in such resolution, shall form a separate capital; provided that the separate capital to be fixed by any such resolution shall not exceed the amount of capital by shares or stock, and borrowing or debenture stock, authorized by this Act; and in the event of any capital being constituted a separate capital, it shall be applied primarily to the completion of the *Lynn* loop line."

By sect. 15: "The directors of the company shall have the working and management of the affairs of such separate undertaking if constituted as aforesaid, and they and any committees appointed by them for the purposes of such undertaking shall, subject to the provisions of this Act, have and exercise all such and the same powers with respect thereto as they have or might have or exercise with respect to the rest of the undertaking of the company."

By sect. 16: "The terms and conditions upon which such separate undertaking shall be worked and managed by the company, and the dividends or annual or other sums to be paid to or upon the shares or stock constituting the separate capital out of the gross receipts arising from the traffic of the separate undertaking, and from traffic passing over both the separate undertaking and any of the other railways of the company, or any other railways, and the payments to be made in respect of the use of such separate undertaking for the general traffic of the company, shall be such as shall be defined and settled by an extraordinary general meeting of the company, duly convened with notice of the object, and by such votes as are required under this Act to constitute a separate undertaking. And the substance of the terms and conditions upon which the shares or stock constituting the separate capital of every such separate undertaking

are created and issued shall be indorsed upon the certificates thereof; and the company may, out of any money not required for any other purpose, contribute to such separate undertaking, and hold shares in such separate capital."

By sect. 17: "In the event of a separate undertaking being constituted under this Act, then, unless it be otherwise provided by the resolution creating the same, the holders of shares or stock in the separate capital shall not be entitled to vote at meetings of the company, except in relation to matters concerning the separate undertaking."

By sect. 18: "In the event of the *Lynn* loop line being constituted a separate undertaking in manner aforesaid, any money borrowed for the purpose of such undertaking under the powers of this Act shall be charged on the separate undertaking only, and the company shall not pay interest thereon, or repay the principal thereof, except out of money arising from or charged upon the separate undertaking, and the separate undertaking and the revenue arising therefrom shall not be liable for any mortgage or debenture debt or other charge upon any other part of the undertaking of the company, or for the payment of interest thereon."

By sect. 20: "In the event of the *Lynn* loop line being constituted a separate undertaking under this Act, the powers of the company under preceding provisions of this Act to raise additional capital by shares and stock, and to borrow on mortgage, shall be reduced by the nominal amount of the separate capital."

Sect. 21: "All moneys raised under this Act, whether by shares, stock, debenture stock, or borrowing, may be applied for the purposes of the *Lynn* loop line, or for the general purposes of the company, to which capital is properly applicable, and not otherwise."

On the 16th of July 1884, an extraordinary general meeting of the company was held, at which five resolutions were duly passed. The first resolution was as follows: "That the following resolutions passed at a meeting of the directors held this day be and they are hereby respectively confirmed, viz., 'That the *Lynn* loop line, being Railway No. 1 described in and authorized by the

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Lynn and Fakenham Railway Act, 1882, shall constitute a separate undertaking; that the £100,000 capital authorized to be raised by the *Eastern and Midlands Railway Act*, 1884, shall constitute a separate capital as provided by sect. 14 of that Act.'" The other four resolutions were rescinded at a subsequent extraordinary general meeting of the company, held on the 7th of October, 1884, and other resolutions were passed in lieu of them. The resolutions then substituted were as follows:—

"(A.) That the directors be and they are hereby authorized to issue stock of the company to the extent of £100,000, authorized by the *Eastern and Midlands Railway Act*, 1884, and constituting the capital of the separate undertaking, such stock to be called the *Lynn* Loop Guaranteed Stock, and to bear a fixed dividend of £5 per cent. per annum, payable half-yearly on each 15th of January and 15th of July, in respect of the half-year terminating on the previous 31st of December or 30th of June, such dividend to commence as from the time when the *Lynn* loop line is opened for public traffic.

"(B.) That the directors be and they are hereby authorized to exercise the borrowing powers in respect of the separate undertaking conferred upon the company by the *Eastern and Midlands Railway Act*, 1884, by the issue of £33,000 debenture stock, to be called *Lynn* Loop Debenture Stock, and to bear interest at the rate of £4 10*s.* per cent. per annum, to commence from the date of issue, and to be payable half-yearly on each 15th of January and 15th of July, in respect of the half-year terminating on the previous 31st of December or 30th of June respectively."

"(C.) That the directors be and they are hereby authorized to issue the said stocks respectively on such terms and conditions, at such times, to such persons, and at such prices as they may think fit.

"(D.) That the company, at their own expense, shall, for ever after the opening of the *Lynn* loop line for public traffic, work the same as provided by the *Eastern and Midlands Railway Act*, 1884, and maintain the same and all works and conveniences connected therewith in good working order and condition.

"(E.) That the dividends and interest on the *Lynn* Loop Guaranteed Stock and *Lynn* Loop Debenture Stock respectively

be guaranteed by the following tolls in respect of the use of the separate undertaking for the general traffic of the company, viz.: For traffic of all descriptions the maximum fares, tolls, rates, and charges which the company is authorized to demand and take, to be calculated as if the length of the *Lynn* loop line were six miles.

"(F.) That from the opening of the *Lynn* loop line for public traffic the company shall pay the daily sum of £17 15*s.* 5*d.*, as a payment in respect and on account of the aforesaid tolls, into a separate banking account, in the names or name and to the credit of the trustees for the time being of the trust deed hereinafter mentioned, to be applied by them or him in payment of the dividends and interest on the *Lynn* Loop Guaranteed Stock and *Lynn* Loop Debenture Stock respectively.

"(G.) That, so long as such daily sums shall be duly paid, the company shall not be required to make any further payments in respect of the aforesaid tolls, or to render any account thereof; but the company shall not be entitled to claim any diminution of such daily sums on the ground that the aforesaid tolls would or might, if an account thereof were taken, amount to a greater or less sum, it being intended that the payment of such daily sums shall form an absolute and indefeasible guarantee for the dividends and interest on the *Lynn* Loop Guaranteed Stock and *Lynn* Loop Debenture Stock respectively.

"(H.) All sums payable by the company under the preceding resolutions shall be payable out of and charged upon the gross receipts arising from the traffic of the separate undertaking, and from traffic passing over both the separate undertaking and any of the other railways of the company, or any other railways, and shall be deemed to be sums paid by the company in respect of the use of the separate undertaking for the general traffic of the company.

"(I.) That the draft trust deed now submitted to this meeting, and initialed by the chairman, be approved, and that the directors be empowered to nominate the trustees thereof and to fix their remuneration, and that the directors be authorized to affix the seal of the company to an engrossment of the trust deed when so much of the *Lynn* Loop Guaranteed Stock shall have

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been subscribed for as, in the opinion of the directors, to render it advisable to proceed to an allotment."

In pursuance of the resolution (I.) the trust deed, dated the 11th of October, 1884, was executed. Messrs. *Heyworth & Stride* were the trustees nominated by the directors of the company. By this deed the company covenanted with the trustees (as representing the persons who might subscribe for and might from time to time hold the *Lynn* Loop Guaranteed Stock and *Lynn* Loop Debenture Stock) (*inter alia*) as follows:—

(1.) The company thereby ratified and confirmed the resolution No. 1 of the 16th of July, 1884, and all the resolutions of the 7th of October, 1884, to the intent that the same might be deemed to be and might operate as an irrevocable and perpetual contract between the company and the holders of the *Lynn* Loop Guaranteed Stock and *Lynn* Loop Debenture Stock.

"(4.) All moneys paid by the subscribers for the *Lynn* Loop Guaranteed Stock and *Lynn* Loop Debenture Stock shall be paid by such subscribers into a separate banking account in the names and to the credit of the trustees.

"(5.) Out of any sums of money so paid in respect of any *Lynn* Loop Debenture Stock, the trustees shall set apart a sufficient amount to provide for the interest to accrue thereon, until the 31st of December, 1885, and the amount so set apart shall be applicable for the payment of such interest, and not otherwise, and shall be applied for that purpose half-yearly by the trustees.

"(6.) Subject to the provisions lastly hereinbefore contained, all moneys so paid to the credit of the trustees by the subscribers for the *Lynn* Loop Guaranteed Stock and *Lynn* Loop Debenture Stock shall be applied primarily to the completion of the *Lynn* loop line, and such application shall be made" in the manner thereinafter mentioned.

Then it was provided that, after the loop line should have been opened for public traffic, the residue of the moneys paid to the credit of the trustees (after satisfying all liabilities incurred by the company for the purchase of land, or for the execution of works, or otherwise, in connection with the construction of the loop line) should be payable to the company, and any part

thereof not required by the company for recouping their expenditure in completing the loop line might be applied by the company for the general purposes of the company, to which capital was properly applicable as provided by the Act of 1884.

The guaranteed stock and the debenture stock for the purposes of the loop line were subscribed for, and the line was opened for traffic. For the purposes of working the whole of their lines (including the *Lynn* loop line) the company hired a quantity of rolling stock under various hiring agreements, which provided that the rolling stock was to be paid for by a series of instalments in the nature of rent at fixed periods. On the complete payment of all the instalments, the rolling stock was to become the property of the company; but until then it was to remain the property of the vendor. In default of payment of any instalment, the vendor was entitled to retake possession of the rolling stock. Some of the instalments due under these agreements fell into arrear, and on the 27th of June, 1889, *William Jones*, to whom an unpaid instalment was due under one of the agreements, recovered judgment against the company for the amount thus due to him. On the 28th of June, 1889, he presented a petition under the *Railway Companies Act*, 1867, for the appointment of a receiver and manager of the company; and on the 10th of July, 1889, an order was made appointing Mr. *Robert Arthur Read*, the chairman of the company, receiver and manager of the company's undertaking, and to receive the tolls and sums of money arising upon or out of the undertaking. Subsequently these two summonses were taken out, the second, by the company and the receiver and manager, being taken out on the 11th of December, 1889.

The summonses came on for hearing before Mr. Justice *Kay* on the 28th of June, 1890.

Rigby, Q.C., and *Dunning*, for the summons of the trustees of the deed of the 11th of October, 1884, contended, that under the Act of 1884 the gross receipts were hypothecated for the purpose of paying the sums referred to in resolutions E and F in priority to the general debts of the company; or, if not, that the under-

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taking of the *Lynn* loop line was in the position of a landlord entitled to a rent charged upon and payable out of the gross receipts; that this "rent" formed part of the "working expenses" for the discharge of which provision was made by sect. 4 of the *Railway Companies Act*, 1867.

Marten, Q.C., and *Farwell*, for the summons by the receiver and manager, relied on sect. 4 of the *Railway Companies Act*, 1867, as giving priority to "working expenses," properly so-called, over all other claims; "working expenses" including instalments for hire of rolling stock.

[They referred to *Re Cornwall Minerals Railway Company* (1), and *In re Mersey Railway Company* (2).]

Renshaw, Q.C., and *F. Thompson*, for the judgment creditor, also relied on sect. 4 of the *Railway Companies Act*, 1867, as giving priority to payments for "working expenses." They also contended that any arrangements between the various stockholders of the company could not affect the rights of creditors, and that dividends on the company's stocks were payable out of "profits" only, and not out of "gross receipts."

[They referred to the *Companies Clauses Consolidation Act*, 1845, ss. 120, 121; *Companies Clauses Act*, 1863, ss. 13, 14, 15, 22, 23, 24; *Railway Companies Act*, 1867, ss. 4, 23, 24; *Bloxam* v. *Metropolitan Railway Company* (3); *Attree* v. *Hawe* (4); and *In re Manchester and Milford Railway Company* (5).]

Whinney, for shareholders of the company's *Cromer* line.

J. Cutler, for the company's 4½ per cent. debenture-holders, suggested that the validity of some at least of the contracts for hire of rolling stock might be open to question, on the ground that they did not constitute a *bonâ fide* sale and hiring back; that in the claims sent in against the company some of the contracts had been included under the head of "Mortgages,"

(1) 48 L. T. (N.S.) 41.
(2) 37 Ch. D. 610.
(3) Law Rep. 3 Ch. 337, 350.
(4) 9 Ch. D. 337, 349.
(5) 14 Ch. D. 645, 651.

and that a "mortgage" would not be allowed under the cloak of a hiring contract.

Rigby, in reply, on the first summons.

Marten, in reply, on the second summons.

KAY, J. (after stating the facts, continued):—

It is said that the Act of 1884 made the gross receipts of the loop line, and of all traffic which passed over the other lines of the company and over that loop line, first of all chargeable with the debentures which were issued for the purpose of borrowing money for making that loop line and for other purposes, and also with the interest upon the share capital raised for the purpose of that loop line, and other purposes under this Act of 1884. What actually took place was this: the loop line was made; the resolutions were passed; the loop line was constituted a separate undertaking; and the trust deed, the trustees of which have taken out the former of these two summonses, was executed. Under that deed the shares by which the money was raised for the purpose of the loop line were issued, the debentures also were issued, and the money obtained by borrowing was also raised, and upon the certificate of the shares there are indorsed, as the Act requires, the conditions of issue according to these resolutions, which are all recited in the trust deed.

The argument has been that the effect of the proceeding under the Act of 1884 was to make the gross receipts of the traffic passing over the loop line, and of all other traffic passing over the other railway and by the loop line, charged, first of all, with the interest of that debenture debt borrowed under this Act of 1884, and also with the dividend at a fixed rate of 5 per cent. upon the shares into which the capital raised under this Act of 1884 was divided. Now, assuming for the moment that to be so, what has taken place is this. The line does not seem to have been a very profitable one, and the mode in which it has been worked is, that the *Eastern and Midlands Company* have hired, as I understand, for the working of all their lines, a quantity of rolling stock consisting of engines and carriages.

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This rolling stock is hired under contracts with various persons, the terms of the agreements being, as I understand them, to the effect that payments are to be made for the rolling stock by certain fixed instalments, and that when the payments are all made the rolling stock will become the property of the company: if the payments are not made, or any of them fall into arrear, the persons who have let rolling stock to the company have, under their separate agreements, a right to retake possession of the rolling stock, the effect of which would be to make the company lose all the payments they had already made in respect of the rolling stock, and to deprive the company for the time being, until they could make other arrangements, of the rolling stock which had been so retaken. That would practically put a stop to the working of the line unless these instalments were paid, and they are somewhat now in arrear. There are some arrears to pay as well as future payments. Practically, unless the instalments are paid, the company will be deprived of this rolling stock. Therefore the company will be stopped in all its operations unless and until it can provide itself with other rolling stock.

Now, what has happened is this. On the 28th of June, 1889, one of these rolling-stock creditors named *Jones*, who had obtained a judgment against the company for one of the instalments, presented a petition under the Act of 1867. I have given the date of the formation of this company. The amalgamation, I have said, was in 1882, and this company, practically, was formed in that year.

The *Railway Companies Act*, 1867, is an Act very familiar to us in these Courts. It was passed for the purpose of enabling a judgment creditor who had obtained judgment against a railway company to have a remedy that should not of necessity put a stop to the working of the railway. Before that Act of Parliament a judgment creditor, who had obtained judgment for a debt against a railway company, could issue a *fi. fa.*, and seize all the rolling stock and other chattels and goods of the company. Of course, therefore, a judgment creditor had the power of completely strangling the whole undertaking of the company. The Act of 1867 was passed, as we know, to prevent that, and it provides,

speaking generally, that a judgment creditor shall no longer have that right. It takes away from him his power of seizing the rolling stock and of strangling the whole undertaking, and substitutes instead a power to obtain, not only a receiver, but a receiver and manager of the line. Then it goes on to say what shall be done by the receiver and manager with the moneys he receives.

Now, taking a general view of the nature of the enactment, which I will notice more in detail presently, what could be more reasonable or proper than that the Legislature should provide absolutely, as against every person interested in the railway, whether as debenture-holder, mortgage-holder, or judgment creditor, that the receipts of such receiver and manager should be dealt with as directed by the Act? From the bare outline of the case as I have stated it, it follows that these receipts would probably have no existence whatever if it were not for this Act of Parliament. But for the Act of Parliament the judgment creditor might prevent the company carrying on business at all by seizing all its rolling stock. The railway company would be absolutely powerless if this rolling stock were taken away from it. Therefore, the receipts of the receiver and manager are practically in that sense created by the Act of Parliament. The judgment creditor, instead of seizing the rolling stock and selling it and paying himself or any other judgment creditor, is now prevented from seizing the rolling stock. The object of the Act is to enable the company to carry on its business notwithstanding the judgment creditor, because it is, after all, for the benefit of the judgment creditor and also of everybody else interested in the line that its working should not be stopped, but should be carried on, though under the direction of an officer of the Court. Then the receipts of that officer of the Court are receipts which he comes into possession of under and by virtue of this Act of Parliament, and there is nothing unreasonable (the object of the Act evidently being to enable the line to be carried on) in the Act saying that the first thing he shall do with these receipts is to pay the working and other expenses necessary for carrying on the line.

Now I will assume for the moment that the trustees of the trust

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deed are right in their contention, and that they have under this Act of Parliament a first charge upon a certain part of the gross receipts; that the interest upon the shares and debentures of the separate undertaking should be paid first—that is, before any of the working expenses of the line. What effect has the Act which was passed in 1867—that is, long before this railway company was amalgamated—upon such a right as that? The 4th section says: "The engines, tenders, carriages, trucks, machinery, tools, fittings, materials, and effects, constituting the rolling stock and plant used or provided by a company for the purposes of the traffic on their railway, or of their stations or workshops, shall not, after their railway or any part thereof is open for public traffic, be liable to be taken in execution at law or in equity at any time after the passing of this Act, and before the 1st day of September, 1868, where the judgment on which execution issues is recovered in an action on a contract entered into after the passing of this Act, or in an action not on a contract commenced after the passing of this Act; but the person who has recovered any such judgment may obtain the appointment of a receiver, and, if necessary, of a manager, of the undertaking of the company, on application by petition" to the Court of Chancery. That is what this judgment creditor has done; and the section goes on to say, "and all money received by such receiver or manager shall, after due provision for the working expenses of the railway and other proper outgoings in respect of the undertaking, be applied and distributed under the direction of the Court in payment of the debts of the company and otherwise according to the rights and priorities of the persons for the time being interested therein; and on payment of the amount due to every such judgment creditor as aforesaid the Court may, if it think fit, discharge such receiver or such receiver and manager."

Then sect. 23 provides, that "all money borrowed or to be borrowed by a company on mortgage or bond or debenture stock under the provisions of any act authorizing the borrowing thereof shall have priority against the company and the property from time to time of the company over all other claims on account of any debts incurred or engagements entered into by them after the passing of this Act."

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The question came before the Court of Appeal in the case of *Re Cornwall Minerals Railway Company* (1). In that case a railway company sold its railway stock to a waggon company for a sum of money, and this waggon company let the rolling stock back to the railway company at a rent, on payment of which for a term the company were to become repossessed of the rolling stock, the rent being equal to the purchase-money and interest. That case came before me, in the first instance, on the question whether that was a borrowing; and I came to the conclusion that it was a borrowing. The instalments were calculated exactly so as to discharge, both the principal, for which they had sold the rolling stock, and the interest upon that principal. However, the Court of Appeal came to a different conclusion. They held that it was a *bonâ fide* sale and re-hiring; and accordingly that the company were to be treated as though they were *bonâ fide* hirers of the waggons. After that there was a receiver appointed under this Act of 1867; and the question arose whether that receiver was or was not to pay, for the hire of this rolling stock, the sums which, when paid, would make the rolling stock the property of the company again, because they were calculated as instalments of the capital with an addition of interest; and when they had been paid up to a certain period the rolling stock was to become the absolute property of the company again. The Court of Appeal had not the least doubt in the world that, as against debenture-holders whose debentures were issued after the date of the agreement of sale and re-hire, the receiver was to do that which the 4th section of the Act of 1867 directed him to do, namely, to pay working expenses, and that working expenses did include these instalments of the payments for the rolling stock, although the instalments were so calculated that after a series of such payments at the defined time the rolling stock would become the property of the company again. Now, in that case, no doubt, the debenture-holders were ordinary debenture-holders whose rights were exactly those defined by the Court in *Gardner* v. *London, Chatham, and Dover Railway Company* (2). They had no right whatever to any specific part of the company's property: their only right was to the fruit, as

(1) 48 L. T. (N.S.) 41. (2) Law Rep. 2 Ch. 201.

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Lord *Cairns* said, of the fruit-bearing tree—that is, the profits of the company after its working expenses had been paid. In the case of the *Cornwall Minerals Railway Company* (1) it was held most distinctly that the working expenses, including those instalments, were to be paid before the debenture-holders got anything; and also this was held, that the 23rd section of that Act of 1867, which gave or preserved the priority of debenture-holders, did not alter the effect of the 4th section in the least; that sect. 4, which said that the working expenses were first to be paid, was to be read into or in connection with sect. 23, so that the priority of the debenture-holders was subject to the payment of the working expenses. I confess that seems to me, and I think must seem to every one, so extremely reasonable a view of the Act of Parliament that it is impossible to dissent from it. As I have said, but for the Act of 1867, in that case as in this, there would have been, presumably, no receipts of the line at all, because all the rolling stock of the company would be swept away, and the line could not be carried on if the judgment creditors were allowed to come down upon it and take away the rolling stock. Therefore, the receipts are receipts which are practically secured, if not created, by the provisions of the Act of 1867. Accordingly, as I have said, it is most reasonable that the Legislature, by this Act of 1867, should provide, to this extent at least, what is to be done with these receipts, namely, that they should be first of all applied in carrying on the line for the benefit of everybody, and that, in order to ensure that result, the working expenses and other proper outgoings in respect of the undertaking shall first of all be paid out of the receipts which the receiver and manager appointed by the Court under the statute shall get into his hands. Now, does it make any difference that in this case there are, if there are, shareholders and debenture-holders whose right is peculiar and different from that of the ordinary debenture-holder and shareholder, namely, that they are not to be paid out of profits of the line but to be paid out of gross receipts? It may still be said to them, "But for this Act of Parliament there would not be any gross receipts. Therefore the payment is not being made

(1) 48 L. T. (N.S.) 41.

out of anything that would otherwise come to you; it is being made out of that which would not exist but for this Act of Parliament. It is accordingly no wrong to you that, in order to ensure the existence of gross receipts, these payments should be made. There would be nothing to receive but for these payments, and the Act of Parliament says these payments shall first be made." I think that, even if there be that difficulty, it seems quite reasonable that the Legislature should have intended—as, in my opinion, it did intend—that when a receiver and manager was appointed at the instance of a judgment-creditor, the receipts which would not have had any existence at all but for that appointment should, whatever the charges upon them might be, be applied first of all in payment of working expenses and other proper outgoings. Otherwise the absurd result would follow, that the receiver would have his hands tied, and that although the gross receipts came into his hands he would have to hand them over immediately to the claimants of those gross receipts, and the line would be stopped notwithstanding the appointment of the receiver and manager. But this Act of Parliament meant that the line should not be stopped; and the receiver and manager was to be appointed in order to prevent this stoppage of the working of the line. That I take to be the paramount object.

I have assumed that under this trust deed the shareholders and debenture-holders of the separate undertaking have a charge upon the gross receipts of part of the line. I really do not think it necessary to go at length into that; but before I came to that conclusion I certainly should require a great deal more consideration than I have yet been able to give to this case.

Reliance is placed chiefly on sect. 16 of the *Eastern and Midlands Railway Act*, 1884. That Act, after providing that by resolution the loop line may be constituted a separate undertaking, provides by sect. 16, that "the terms and conditions upon which such separate undertaking shall be worked and managed by the company, and the dividends or annual or other sums to be paid to or upon the shares or stock constituting the separate capital out of the gross receipts arising from the traffic of the separate undertaking, and from traffic passing over both

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the separate undertaking and any of the other railways of the company, or any other railways, and the payments to be made in respect of the use of such separate undertaking for the general traffic of the company, shall be such as shall be defined and settled by an extraordinary general meeting of the company, duly convened with notice of the object, and by such votes as are required under this Act to constitute a separate undertaking." Now, it is very extraordinary that the section does not say that the gross receipts shall be charged, as a first charge, with those payments; but it says that the payments to be made out of the gross receipts "shall be such as shall be defined." That is, you are to define what payments are to be made; and it is only the incidental mention of "gross receipts" (which is very extraordinary, and to my mind not very intelligible) in that section upon which the argument is founded that the section means that, when the payments are fixed, those payments are to be a first charge upon the gross receipts as defined in this section. I can only say, that if the Legislature did mean that, there were plenty of ways of expressing it a great deal more clearly and definitely than is done here; and looking to the fact that by the general Acts of Parliament relating to railway companies it is expressly enacted that not only dividends on shares, but interest upon borrowed money, shall be paid, and only paid, out of the profits, one would expect something a great deal more definite than this Act of Parliament if that rule was intended to be altered. However, I am not going to express any further opinion upon the subject, because it seems to me that, even assuming that the claim of the trustees of this deed were well founded, the moneys which come to the hands of the receiver and manager appointed under the Act of 1867 must, notwithstanding this provision, be first applied in the payment of the working expenses of the railway and other proper outgoings in respect of the undertaking.

Then another question is, Do these instalments under the hiring agreements fall within the words "working expenses and other proper outgoings"? In the case of *Re Cornwall Minerals Railway Company* (1) the instalments were held to come

(1) 48 L. T. (N.S.) 41.

within those words, and I do not see the least difference between that case and this. These instalments are payments which, if continued for a certain time, will entitle the company to the rolling stock. In that respect this case is precisely the same as that of *Re Cornwall Minerals Railway Company* (1); and as they were held to be "working expenses" there, so they must be held to be working expenses here. But, apart from that case, how can it be said these are not working expenses and proper outgoings without which the line cannot be carried on? That is the test. Without these payments you could not carry on this line for a day. If all the persons who let rolling stock to the company were to come, as I am told they might under their several agreements, and seize the rolling stock, there would be an end of the working of the line. It is no use saying the company would then have to make other arrangements. A company in such a position could not very easily make other arrangements. At any rate the working, as it was when the receiver and manager was appointed, was carried on by means of this rolling stock; and to carry on that working these payments must be made or it cannot be carried on. It seems to me that the payment of these instalments is a proper payment to make to carry on that working.

There are one or two other points which remain. Mr. *Cutler* has made a suggestion which I am surprised to hear. He suggests that these agreements may, after all, be agreements which could not be supported; that they are agreements which are somehow or other in law invalid, either because they are in excess of borrowing powers or that they constitute a sham borrowing, or something of that kind. Now, to make that suggestion when there is not one tittle of evidence before me to that effect seems to me rather startling. The summons of the receiver and manager was taken out on the 11th of December, 1889, and from that day to this anybody who wished to raise a case of that kind has had ample opportunity of putting in any evidence he chose. Yet without one shred of evidence counsel makes the suggestion that the Court should not allow these payments because they are possibly invalid. If there is no ground for

(1) 48 L. T. (N.S.) 41.

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making any such suggestion, the Court does not presume fraud or improper conduct. The parties have had ample opportunity of bringing forward any evidence which they liked on the subject and have not chosen to do so. The suggestion is one which I cannot listen to for a moment.

Then it is said that there are certain arrears of these instalment payments, and that although it might be right to make current payments it is not right to pay the arrears. But the answer is a very simple one. Are arrears of working expenses not "working expenses"? They are not the less "working expenses" because they are arrears. "Working expenses" does not mean, necessarily, current payments; and if even arrears are not paid, as I understand, the owners of the rolling stock have power to retake possession of it. Therefore, there is just as much reason for paying arrears as there is for paying the current payments; and it seems to me that, even if the arrears are not "working expenses," they would come within the other words of the section which I have read, "other proper outgoings"; and accordingly it seems to me that both of these payments should be made.

Now, I think I have exhausted all the arguments except one suggestion of Mr. *Dunning*, which is this. He says, "My clients, the trustees of the deed, are claiming the working expenses." That is no doubt an ingenious suggestion; but I cannot accede to it. Mr. *Rigby*, who opened the case with Mr. *Dunning*, said that the payments which were to be made under the resolutions constituting the *Lynn* loop line a separate undertaking, and which were fixed at so much a day, covering a charge of 5 per cent. dividend on the shares and 4½ per cent. on the debentures of this separate undertaking, were in the nature of a rent. The analogy is far-fetched, because, although it is a separate undertaking, it is an undertaking of the same company, and the company must be its own landlord in order to make it rent. But it is not really in the nature of a rent. I have no doubt Mr. *Rigby* is right in saying that the object was to enable them to raise this capital more easily—to give to the people who advanced the money on the debentures of this separate undertaking, or to those who took shares in it, some more definite

security than they otherwise would have. That was no doubt the motive, because the conditions were to be indorsed on the certificate, as they in fact were; so that, when anybody took shares, he saw on the certificate that this had been constituted a separate undertaking, and that the resolution affected to provide for the interest and dividends by payment out of certain portions of the gross receipts. That is all quite true; but nevertheless, I say again, I think the analogy is not a true one. The real state of things was this (and this is, I think, the highest mode in which it can be put in favour of the argument of the trustees), that this share capital and debenture debt were constituted under these provisions by a contract with each lender or shareholder under which he was to take advantage of this Act of Parliament of 1884 and these resolutions. It was a separate contract with each one of them, as is shewn by the indorsement on the certificate. In that way the raising of this capital was facilitated, and a shareholder might say, "You must keep good faith with me and carry out my contract." But it is not really like a rent for the working of the line. A rent for the working of a line is a bargain between two separate railway companies. One says, "I will let to you my line on these terms, that you pay me so much a day, or so much a week, or so much a month, for the use of the line, and subject to that you shall have all the advantage of the capital which has been expended on the line." In that case the rent might be called part of the working expenses of the hiring company, because it formed part of the terms upon which that company was to work the line of the other company. But this is, to my mind, a perfectly different case, and I do not see any analogy at all between the case of hiring a railway belonging to another company and making this loop line under these particular provisions which were meant (putting the case as high as possible for the benefit of the trustees and those who claim under the deed) really as an inducement to persons to take shares in, and to lend money on debentures of, this separate undertaking.

I therefore hold that the order to be made in this case must be this. There must be, first of all, on the summons of the trustees, a declaration that the applicants are not entitled to the

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tolls or sums payable as provided by resolutions E and F in the trust deed of the 11th of October, 1884, unless and until due provision has been made for the working expenses of the railway and other proper outgoings in respect of the undertaking of which Mr. *Robert Arthur Read* has been appointed receiver and manager by the Order of the 10th of July, 1889. Then, on the second summons by the receiver and manager, there must be an order that such receiver and manager be at liberty to pay the instalments due under the contracts with the company in respect of the rolling stock rents due on the 30th of June, 1889; and that he be further at liberty to make the payments of the instalments due and to become due since that date out of the receipts of the company as they come to his hands, and that such payments be allowed to the receiver on passing his account. I do not think it necessary at present to order the receiver to keep any separate account of the gross receipts which are referred to in the trust deed, because I am told that, for the present at any rate, the payments which have to be made in respect of the rolling stock will more than exhaust all his receipts. If that is so, it would be idle to direct him to keep any separate account until these payments have been made.

G. I. F. C.

C. A.

The trustees of the deed appealed. The appeal came on for hearing on the 31st of July, 1890.

Rigby, Q.C., *Dunning*, and *Leeke*, for the Appellants:—

The receiver is entitled to receive only that which is the money of the company; the £17 15*s.* 5*d.* is not part of the company's money. The effect of the resolution is that, as soon as it is received, it becomes the property of the separate undertaking, and ought to be at once paid over to the separate account of the trustees. Resolution H makes it a primary charge on the gross receipts of the loop line, and that resolution is within the authority conferred by sect. 16 of the Act of 1884. For convenience one receiver has been appointed, and he is receiver for all parties interested and for all purposes; but the trustees would have been entitled to have a separate receiver appointed of that portion of the gross receipts which belongs to them. The pay-

ment to the trustees is really part of the "working expenses of the railway or other proper outgoings in respect of the undertaking" within the meaning of sect. 4 of the Act of 1867, and ought, therefore, to be paid first by the receiver, equally with other similar expenses. It is in the nature of a rent for the use by the company of a line belonging to a separate and distinct company.

Renshaw, Q.C., and *F. Thompson*, for the judgment creditor;

Marten, Q.C., and *Farwell*, for the company and the receiver;

J. Cutler, for the holders of 4½ per cent. debentures; and

Whinney, for the shareholders of the company's *Cromer* line; were not called upon.

LORD ESHER, M.R.:—

The first question is, whether the money which will eventually have to be paid to the shareholders and debenture stock holders of the *Lynn* loop line has ever come into the hands of the receiver as money belonging to the company, because, if it has, the question will then arise how the receiver ought to deal with that money.

Now, the first and chief argument on behalf of the Appellants was, that this money never was the money of the old company—the large company, as it has been called. It is admitted that it must, in fact, come into their hands; but it is said that nevertheless, in point of law, it never is their money, but is always the money of the loop-line shareholders and debenture stock holders. That argument was based on the supposition that the loop line is made by the special Act actually and legally a separate company. But when you look into the thing, what is the money, and where is it to come from? The money is the result of the working of the whole line, including the loop line. It arises from the tolls and other payments made to the company in respect of the working of the whole line, including the loop line. What company is that company? The company which is working the line, which has been called the large company. The money would go to them; and out of the money which they thus receive they would have to pay the shareholders and the holders

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of the debenture stock of the loop line. Therefore, there can be no doubt that the money comes to the company which is working the whole line.

Now, who is the judgment creditor? He is the creditor of that company which is working the whole line. If it were not for the Act of 1867, what would his rights be? Subject to another question, with which we have not to deal now, of the effect of this rolling stock being only hired by the company, the creditor would have a right to seize the whole of the rolling stock. That obviously brings the case within the Act of 1867; the money is to be received by the receiver of the company of which the creditor is a creditor—that is, the large company. The money is received by the receiver by virtue of sect. 4 of the Act of 1867, and the moment it is in the hands of the receiver by virtue of that section he is bound to deal with it in the particular way mentioned in that section; and, that being so, it is impossible that he can pay the shareholders and debenture stock holders of the loop line, even though it be to a certain extent a separate company, before he has paid the creditors of the company, unless it can be made out that that payment is a "working expense" within the meaning of sect. 4. If it is not a "working expense" within the meaning of that section, the receiver must pay the creditors of the company before he pays the shareholders and debenture stock holders of the loop line. Therefore the main question must be so decided. The case is within sect. 4; and, unless these are working expenses, the creditors must be paid before the shareholders and debenture stock holders are paid.

Are then the payments to the shareholders and debenture stock holders of the loop line "working expenses"? That depends in a great measure upon the question whether the loop line is a separate company, or in the nature of a separate company, for all purposes, or whether the true view is, that there is one company with a certain separation between one class of shareholders and the other shareholders—a certain separation which does not divide the company or make two distinct companies. If the latter be the true view, then this payment is not an "outgoing." It is only a payment of money by one set of shareholders to another set of shareholders within the same company.

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What, then, is the true view of the Act of 1884 and the resolutions passed thereunder? It seems to me, as I think it did to Mr. Justice *Kay*, and as I think he held in the latter part of his judgment, that there are not two companies, but only one company. One company is the owner of all the lines; but there is a separation within that company between the shareholders. This is shewn by an observation which was made, I think, by my learned Brother Lord Justice *Bowen* during the argument, that the shareholders of the main line would be entitled to vote in respect of matters which concerned the loop line. Looking at the whole of the Act, it seems to me clear that there is but one company, although there is a separation among the shareholders with regard to the mode in which the earnings of the company (whether gross or net, is wholly immaterial for the present purpose) are to be divided between different classes of shareholders. That being so, the payment to the shareholders and debenture stock holders of the loop line is not an "outgoing." That, I think, was the meaning of Mr. Justice *Kay* when, in the latter part of his judgment, dealing with the argument that the payments to the shareholders and debenture stock holders of the loop line were "in the nature of a rent," he said, "the analogy is far-fetched, because, although it" (that is, the loop line) "is a separate undertaking, it is an undertaking of the same company, and the company must be its own landlord in order to make it rent." That is, in effect, a decision that there is but one company; and a little further on Mr. Justice *Kay* said, "I do not see any analogy at all between the case of hiring a railway belonging to another company and making this loop line under these particular provisions." He has held, therefore, that there is but one company, not two companies, and only a partial separation between the shareholders for particular purposes. I agree with his view on both points, and I think that the appeal should be dismissed.

LINDLEY, L.J.:—

I am of the same opinion. Any difficulty which arises in the case is attributable to the use of the expressions "separate undertaking" and "separate capital" in the Act of 1884, and in the

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resolutions passed and the trust deed executed under the provisions of that Act. In order to discover the meaning of those expressions, we must look through the whole of the Act, and then I think the key to the problem will be found. The loop line is called "Railway No. 1" in the Act of 1884, and its construction was authorized by the *Lynn and Fakenham Railway Act*, 1882. The Act of 1884 contains a recital that it will facilitate the raising of capital for the purpose of Railway No. 1, if "the company" be empowered to constitute that railway a separate undertaking with separate capital, and that it is expedient that provision should be made accordingly. Therefore, the loop line is one of the lines of the company. The company made it, though it is for some purposes a separate undertaking of the company. [His Lordship referred to sects. 6, 10, 12 and 13 of the Act of 1884, and continued:—] Then comes sect. 14, which empowers the company to determine whether this £100,000 is to form part of their general capital, or whether it is to be for any purposes a separate capital, and whether the loop line is to be for any purposes treated as a separate undertaking. The scheme of the Act was to allow the company to decide that for themselves. It would be a most extraordinary thing if the intention of the Act was, that the shareholders of the company should decide for themselves whether the dividends on their shares should be paid in priority to all the working expenses of the railway. This would be contrary to common sense, and yet that is what the argument of Mr. *Rigby* on behalf of the trustees comes to. It is said that they are to be paid the £17 15*s.* 5*d.* per day in priority to all the working expenses; that is, they are to come into competition with their own creditors, even with those who are keeping them afloat. That is an astounding proposition. Sect. 14 is the first which refers to a separate capital and a separate undertaking. Then comes sect. 16, upon which Mr. *Rigby* very much relied. [His Lordship read sects. 16, 17 and 18, and continued:—] The general effect of these sections is pretty plain, and no doubt a great deal is left in the power of the company; but it is not left in their power, as I understand the sections, to pass resolutions which would have the extraordinary effect contended for by Mr. *Rigby*. Then the

company passed resolutions under these statutory provisions, and nobody quarrels with the validity of the resolutions; due notice was given, and every step was duly taken. The important resolutions are those which are lettered E, F, G, and H. [His Lordship read the resolutions E, F, and G, and continued:—] As between the various classes of persons interested in the receipts of this company there is to be a separate account kept, and this sum of £17 15*s.* 5*d.* is to be paid to that separate account in the mode afterwards mentioned. This makes the company in one sense a debtor for the amount which is to be paid to the separate account, but I do not think it can be legitimately inferred that that which is a mere arrangement between one class and another, whether shareholders or creditors of the company, creates anything in the nature of a rent to be paid by one company to another for the use of a separate railway. Then comes resolution H, which is important, and was much relied upon by Mr. *Rigby*. "All sums payable by the company under the preceding resolutions" (that is, the £17 15*s.* 5*d.*) "shall be payable out of and charged upon the gross receipts arising from the traffic of the separate undertaking, and from traffic passing over both the separate undertaking and any of the other railways of the company, or any other railways, and shall be deemed to be sums paid by the company in respect of the use of the separate undertaking for the general traffic of the company."

It is contended upon the strength of those words, that this sum, which is "to be payable out of and charged upon the gross receipts," is to take priority over the working expenses, because it is to come "out of the gross receipts." But the working expenses have also to come out of "gross receipts." The resolution does not say that this sum is to be paid first, so as possibly to leave nothing to keep the railway going. The "gross receipts" are the fund out of which all these things are to be paid; I do not mean capital expenditure, but annual outgoings. The question is one of priority. The sum and substance of it all appears to me to be this: that these sums are, like all the other moneys, the moneys of the company. They are not set apart so as to form separate receipts of a separate undertaking in the sense contended for.

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We fall back then upon sect. 4 of the Act of 1867, which comes into operation because a creditor has obtained a judgment against the company. He cannot seize any rolling stock, for there is no rolling stock belonging to the company; and if there were he could not seize it. But he has got that to which he is entitled under the Act of 1867, viz., the appointment of a receiver. [His Lordship read sect. 4 and continued:—] Upon that Mr. Justice *Kay* has made an order which in substance declares that the trustees of the deed are not entitled to be paid the £17 15*s.* 5*d.* in priority to the other creditors. The words are, that the trustees under the deed "are not entitled to the tolls or sums as provided by resolutions E and F, unless and until provision has been made for the working expenses of the railway and other proper outgoings in respect of the undertaking of which *R. A. Read* was appointed receiver."

The question is, whether that order is right or wrong. It appears to me unquestionably right when you work through the Act of 1884; and the only difficulty, as I have already said, arises from the use of the expressions "separate undertaking" and "separate capital." I am satisfied, after studying all the sections of the Act, that it was never intended that the undertaking of the loop line should be separate to the extent which the argument of the Appellants would require. It is to be a separate undertaking for the purpose of raising the capital, and giving certain facilities and advantages to those who provide the capital which is to be attributed to that undertaking; but not for the purpose of entitling the persons who subscribe money either for shares or debentures to be paid their dividends or interest in priority to all the working expenses. Such a contention appears to me to be contrary to good sense, and I think it is not in accordance with the Act.

Bowen, L.J.:—

I am of the same opinion, and I have nothing to add.

Solicitors: *Phillips, Son, & Vallings; Travers Smith, Braithwaite, & Robinson; Renshaws; Janson, Cobb, Pearson & Co.; Mathews & Browne; W. J. Myatt.*

W. L. C.

Distinguished. *In re* SANDBACH [1951] 1 Ch. 294

Dicta of LORD ESHER, M.R., and LINDLEY, L.J., at pp. 399, 400, *applied.* *Re* SANDBACH (*decd.*). [1951] 1 All E.R. 971.

In re LORD EGMONT'S SETTLED ESTATES.

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[1890 E. 758.]

Settled Land—Application of "Capital Moneys"—Redemption of Terminable Rent-charge—Payment of Bonus for Redemption—Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *s.* 21—*Settled Land Acts (Amendment) Act*, 1887 (50 & 51 *Vict. c.* 30), *s.* 1.

Held, that, by sect. 1 of the *Settled Land Acts (Amendment) Act*, 1887, the trustees of a settled estate are authorized to apply "capital moneys" in redeeming a terminable rent-charge, granted in consideration of money borrowed for the purpose of effecting improvements on the estate, by paying not only the balance of principal remaining unpaid, but also a reasonable and proper sum by way of bonus to compensate the lender for loss of interest by reason of the redemption.

Decision of *North*, J., reversed.

Decision of *Kay*, J., in *In re Lord Sudeley's Settled Estates* (1) disapproved.

APPEAL against a decision of Mr. Justice *North*.

A summons was taken out by Lord *Egmont*, the tenant for life of certain settled estates in *Surrey* and elsewhere, asking (1.) that it might be declared that certain charges, specified in a schedule to the summons, were rent-charges within the meaning of sect. 1 of the *Settled Land Acts (Amendment) Act*, 1887; (2.) that it might be declared that any money from time to time in the hands of the trustees of the settlement (being capital money arising under the *Settled Land Act* or applicable as such) might properly be applied by the trustees in the redemption of the specified charges and the balances remaining due thereon, by payment of the respective sums specified in the schedule.

The charges in question were rent-charges created from time to time by the tenant for life under the powers of the *Lands Improvement Company's Act*, 1853, and the subsequent Acts amending the same, for the purpose of repaying, with interest, various sums borrowed by him from time to time from that company in order to carry out permanent improvements, such as drainage, upon the

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settled estates. The rent-charge was in each case payable during a fixed term of years by equal yearly or half-yearly payments, each instalment consisting in part of principal and in part of interest.

In every case the tenant for life was liable, as between himself and the persons in remainder or reversion, to make the periodical payments of the charge which might become payable during the continuance of his interest. Lord *Egmont* had hitherto paid the instalments regularly as they became due; but he now desired that the rent-charges should be redeemed by means of "capital moneys" within the meaning of the *Settled Land Acts*, which were in the hands of the trustees of the settlement.

The lenders of the money were willing to be redeemed, but only on the terms of being paid, in addition to the balance of principal remaining unpaid, a further sum by way of bonus, to compensate them for the loss of interest which they might suffer by reason of their not being able to lend out their principal again upon equally advantageous terms. The trustees were willing to apply the capital moneys in their hands in redeeming the rent-charges; but they doubted whether they would be justified in paying the sums demanded by way of bonus. This summons was accordingly issued to obtain the opinion of the Court.

Mr. Justice *North* held that the trustees might apply "capital moneys" in paying the balance of principal which remained unpaid; but that they could not apply those moneys in paying the bonus, and that the tenant for life must pay the bonus himself. His Lordship thought that the decision of Mr. Justice *Kay* in *In re Lord Sudeley's Settled Estates* (1) applied in principle, and that it prevented him from sanctioning the payment of the bonus.

The tenant for life appealed.

Crackanthorpe, Q.C., and *Reginald Winslow*, for the Appellant:—

Mr. Justice *North* held that he was bound by *In re Lord*

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Sudeley's Settled Estates (1). We say that that case does not govern the present, and that, if it does, it was wrongly decided. Sect. 1 (2) of the *Settled Land Acts (Amendment) Act*, 1887, is retrospective, and it has in effect done away with the decision of this Court in *In re Knatchbull's Settled Estate* (3), that, under sect. 21 of the *Settled Land Act*, 1882, "capital moneys" could not be applied in redeeming terminable rent-charges. Sect. 1 of the Act of 1887 authorizes the application of "capital moneys" in redeeming such a rent-charge as this. This is exactly what it is now proposed to do, and the redemption can only take place on such terms as the owner of the rent-charge is willing to accept. He cannot be compelled to accept redemption, and the bonus demanded is not exorbitant. In *In re Lord Sudeley's Settled Estates* it was not the redemption of a rent-charge which was proposed; it was proposed to apply "capital moneys" in paying the future instalments as they should from time to time become due. That case does not, therefore, govern the present, though Mr. Justice *North* thought that the principle of the decision applied. But, if necessary, we should contend that the payment of the instalments of a rent-charge as they accrue due is authorized by the words of sect. 1, "or otherwise providing for the

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(2) By sect. 21 of the *Settled Land Act*, 1882, "Capital money arising under this Act, subject to payment of claims properly payable thereout, and to application thereof for any special authorized object for which the same was raised, shall, when received, be invested or otherwise applied wholly in one, or partly in one and partly in another or others, of the following modes (namely)" (*inter alia*):—

"(ii.) In discharge, purchase, or redemption of incumbrances affecting the inheritance of the settled land, or other the whole estate the subject of the settlement, or of land tax, rent-charge in lieu of tithe, Crown rent, chief rent, or quit rent charged on or payable out of the settled land;

"(iii.) In payment for any improvement authorized by this Act."

By sect. 1 of the *Settled Land Acts (Amendment) Act*, 1887: "Where any improvement of a kind authorized by the Act of 1882 has been or may be made either before or after the passing of this Act, and a rent-charge, whether temporary or perpetual, has been or may be created in pursuance of any Act of Parliament, with the object of paying off any moneys advanced for the purpose of defraying the expenses of such improvement, any capital money expended in redeeming such rent-charge, or otherwise providing for the payment thereof, shall be deemed to be applied in payment for an improvement authorized by the Act of 1882."

(3) 29 Ch. D. 588.

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payment thereof," and that Mr. Justice *Kay's* decision was wrong. If Mr. Justice *North's* decision is right, sect. 1 will be practically rendered useless.

Onslow, for the trustees :—

I agree that the present case is not really governed by *In re Lord Sudeley's Settled Estates* (1). The trustees do not oppose the application; they desire only to submit the question to the Court. They do not know whether the sum demanded by way of bonus is or is not too large. The question is, whether sect. 1 authorizes the application of "capital moneys" in paying the bonus. The bonus is really interest, and the payment of it would be for the benefit of the tenant for life. "Redeeming" the rent-charge means paying off the principal. The tenant for life ought to pay the interest.

Lord Esher, M.R. :—

Money has been borrowed by the tenant for life of this settled estate for the improvement of the estate, and therefore the case is brought within the terms of the *Settled Land Act*. The tenant for life has for a series of years paid the rent-charge, which was the mode agreed upon of repaying the loan. Certain instalments consisting of principal and interest were to be paid half-yearly until the whole amount borrowed should be repaid with interest. The tenant for life now desires to have the rent-charge redeemed by the trustees of the settlement by means of "capital moneys" in their hands. The trustees doubted whether they could properly redeem on the terms proposed by the lenders, though they were not unwilling to accede to those terms. But before doing so they wished to have the opinion of the Court, whether they would be justified in accepting those terms. Mr. Justice *North* was of opinion that the money had been borrowed for the purpose of improvements authorized by the Act of 1882, and that the trustees had in their hands "capital moneys" which they could apply in redeeming the rent-charge, and he was ready to allow the redemption so far as he thought he could.

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But he thought he was precluded, not indeed by the express terms, but by the logical result of the decision of Mr. Justice *Kay* in *In re Lord Sudeley's Settled Estates* (1), from sanctioning the payment of part of the sum demanded for redemption—that part which has been called a "bonus." The lenders of the money are quite satisfied with their security, but they are willing to accept immediate redemption on payment, in addition to the unpaid balance of the principal, of a "bonus," which represents the difference between the interest which they would obtain by means of the rent-charge, and that which they would be likely to obtain from another security. They are willing to be redeemed at a certain price.

What then is the meaning of sect. 1 of the Act of 1887? It says that "any capital money expended in redeeming such rent-charge . . . . shall be deemed to be applied in payment for an improvement authorized by the Act of 1882." Taking the words in their ordinary sense, they must mean the money which would have to be paid for redeeming the rent-charge—that is, the sum which the owner of the rent-charge would accept for the redemption. It seems to me that the proposed payment comes absolutely within the words of the section. Was then Mr. Justice *North* precluded by the decision of Mr. Justice *Kay* in *In re Lord Sudeley's Settled Estates* from sanctioning the proposed payment? That case was not one of the redemption of a rent-charge. It was asked that the trustees might pay out of capital moneys the instalments of the rent-charge as they should become due, including, that is, interest as well as principal. Mr. Justice *Kay* was of opinion that the interest was a debt due from the tenant for life, and that he could not authorize the trustees to pay it out of "capital moneys." Even if he was right in that view, it does not, I think, affect the present case. But I will venture to say that I think he took too strict a view of the Act of 1887. It is quite true that what he was asked to do did not come within the words "redeeming such rent-charge," but I think it did come exactly within the words "or otherwise providing for the payment thereof." I could not, therefore, agree with the decision in *In re Lord Sudeley's Settled Estates*, even if

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it governed the present case. But I think it does not, for this is a case of redemption pure and simple. In my opinion, therefore, Mr. Justice *North* could have allowed the payment of a bonus for redemption, and we must make a declaration to that effect. But, if the trustees desire to have the question, whether the sum demanded by way of bonus is a proper one, decided by the Court, we must refer the case back to Mr. Justice *North*. The appeal will be allowed.

Lindley, L.J. :—

The case turns upon the construction of sect. 1 of the Act of 1887. That Act was passed in order to remedy a defect in the Act of 1882 which was brought to light in *In re Knatchbull's Settled Estate* (1), in which this Court held that the word "incumbrances" did not include terminable rent-charges. That was a blot in the Act of 1882, and to cure it the Act of 1887 was passed. The words of sect. 1 are very wide. It is to be observed that no distinction is drawn between rent-charges which are by the contract creating them redeemable and those which are not; it applies to all rent-charges equally. In the present case we are asked to apply the Act to a rent-charge which is not redeemable by contract, so that the owner of the rent-charge cannot be compelled to accept payment of the loan in any other mode than that which is provided by the agreement with him, that is, by a series of instalments extending over a number of years. In order, therefore, to redeem the rent-charge you must come to terms with the owner. He says, "I am willing to be redeemed; but you must pay me, in addition to the balance of principal remaining unpaid, something which will compensate me for the loss of interest which I may sustain." If he is asking for an extortionate sum the trustees, of course, will not listen to his proposal. If they are in doubt whether the sum demanded is a proper one, they can ask for the opinion of the Court. If only a reasonable sum is asked by way of bonus, the money must be paid, or the rent-charge must remain unredeemed. It seems to me to follow, that any reasonable and proper sum which is de-

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manded may, and indeed must, be paid, or the Act of 1887 will remain a dead letter.

It is said that this view of the Act is inconsistent with the decision in *In re Lord Sudeley's Settled Estates* (1). That case was somewhat peculiar. The summons only asked that the trustees might be directed to pay out of "capital moneys" so much of the instalments of the rent-charge as represented capital; but at the Bar it was asked that the whole of the instalments, interest as well as capital, might be paid. Mr. Justice *Kay* refused to allow the payment of interest.

I think he took too narrow a view of the section, which speaks of "redeeming the rent-charge," and does not limit the redemption to that part of the rent-charge which represents capital.

I think we ought to make a declaration that the trustees will be justified in paying a reasonable and proper sum by way of bonus for the redemption of the rent-charge, and then remit the case to Mr. Justice *North* that he may decide whether the sum demanded is reasonable and proper.

BOWEN, L.J.:—

I am of the same opinion.

Solicitors: *H. T. Boodle*; *Frere, Forster & Co.*

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In re THE EARL OF RADNOR'S WILL TRUSTS.

Settled Estate—Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *ss.* 37, 53—*Heirlooms—Sale by Tenant for Life—Discretion of Court to allow Sale.*

In exercising the power of sale of heirlooms conferred upon a tenant for life of settled estate by sect. 37 of the *Settled Land Act*, 1882, the tenant for life is, by force of sect. 53, in the position of a trustee with a discretionary power to sell, and must have regard, not to his own interests alone, but to the interests of all persons entitled under the settlement, the interest of those more remotely entitled being of less weight than the interest of those nearer to the succession.

The Court, in giving its sanction to any such proposed sale, must in the exercise of its judicial discretion be satisfied that, under the circumstances of each particular case, the sale is reasonable and proper, having regard to the interests of all parties entitled.

SUMMONS under the *Settled Land Act*, 1882, by which the Court was asked to authorize the sale by a tenant for life of certain personal chattels settled as heirlooms.

The Applicant, the Earl of *Radnor*, who was tenant for life in possession under the will of his late father, had entered into a conditional contract with the trustees of the *National Gallery* for the sale to them, for £55,000, of three pictures by *Holbein*, *Velasquez*, and *Moroni* respectively, which formed part of a gallery of 279 pictures at *Longford Castle*, all of which had been settled as heirlooms by the testator in his will, so as to devolve with the *Longford* estate and the title. The lands, to which the heirlooms were annexed, were strictly settled in the male line by the will of the testator, who was the owner in fee simple, so as to go with the earldom. The Earl's eldest son, Viscount *Folkestone*, who was twenty-two years of age and was the next tenant for life under the will of the testator, supported the application; the Earl's younger son, the next tenant for life after Viscount *Folkestone*, was an infant of twelve years of age. There was no tenant in tail in existence. The application was opposed by Lord *Penzance*, the surviving trustee of the will; by the Hon. *Duncombe Pleydell Bouverie*, the Earl's brother, who was entitled in remainder after the Earl's two sons, and by other

members of the family more or less remotely entitled in remainder.

Sect. 37 of the *Settled Land Act*, 1882 (45 & 46 Vict. c. 38), provides as follows:—

"(1.) Where personal chattels are settled on trust so as to devolve with land until a tenant in tail by purchase is born or attains the age of twenty-one years, or so as otherwise to vest in some person becoming entitled to an estate of freehold of inheritance in the land, a tenant for life of the land may sell the chattels or any of them.

"(2.) The money arising by the sale shall be capital money arising under this Act, and shall be paid, invested, or applied and otherwise dealt with in like manner in all respects as by this Act directed with respect to other capital money arising under this Act, or may be invested in the purchase of other chattels, of the same or any other nature, which, when purchased, shall be settled and held on the same trusts, and shall devolve in the same manner as the chattels sold.

"(3.) A sale or purchase of chattels under this section shall not be made without an order of the Court."

By sect. 53: "A tenant for life shall, in exercising any power under this Act, have regard to the interests of all parties entitled under the settlement, and shall, in relation to the exercise thereof by him, be deemed to be in the position and to have the duties and liabilities of a trustee for those parties."

The summons was heard in Chambers; but the surviving trustee of the will having intimated his intention of appealing against the decision, an adjournment into Court was ordered by Mr. Justice *Chitty*, for the purpose of delivering the following written judgment.

Romer, Q.C., and *W. C. Druce*, for the tenant for life, in support of the summons.

Sir *Horace Davey*, Q.C., and *Samuel Dickinson*, for the surviving trustee of the will.

Latham, Q.C., and *Theobald*, for the Hon. *Duncombe Pleydell Bouverie* and others entitled in remainder.

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This application was heard in Chambers. Had it been intimated to me that any of the parties intended to appeal, I should, in accordance with the usual practice, have at once adjourned the matter to be heard in open Court. Since my decision in Chambers, the sole trustee for the settlement has asked for a certificate to enable him to take the case to the Court of Appeal without being put to the necessity of moving before me in Court to discharge the order. To save expense and to expedite the appeal, I have granted a certificate, being satisfied with the argument in Chambers. I gave my reasons for my decision at the conclusion of the arguments, but, for the purpose of my reasons being properly presented to the Court of Appeal, I now proceed to state them in open Court. In accordance with the practice, the trustee alone was served with the summons in the first instance; but, at the request of Mr. *Duncombe Pleydell Bouverie*, a subsequent tenant for life, and with a view to relieve the trustee from the sole burden of arguing the case, I directed that Mr. *Duncombe Pleydell Bouverie* should also be served.

The application is made by the Earl of *Radnor*, the tenant for life in possession, asking the Court to sanction a conditional contract for sale of certain heirlooms. Under sect. 37 of the Act the tenant for life in possession has the power to sell settled heirlooms; but that power cannot be exercised without an order of the Court. The section itself gives no indication of the grounds upon which the Court has to proceed in making or refusing to make the order. It is obvious that it is a discretionary jurisdiction, and, being conferred upon a Court of justice, it follows that it is to be exercised upon judicial principles. But, as I have said in *Duke of Marlborough* v. *Sartoris* (1), although the section itself contains no guide to the Court as to the grounds upon which it should proceed, sect. 53 does afford some assistance. That section treats a tenant for life as a trustee, and enacts that in exercising any power under the Act he shall have regard to the interests of all persons entitled under the settlement. The phrase has been borrowed from previous Acts of Parliament: see sect. 20 of the *Settled Estates Act*, 1877. The

(1) 32 Ch. D. 616.

tenant for life, therefore, has a discretionary power of sale over the settled chattels, in the exercise of which he is to be treated as a trustee who is to have regard to the interests of all persons under the settlement. In the exercise of a discretionary power by a trustee, the Court in its ordinary jurisdiction will see that the power is not exercised improperly or unreasonably: *Tempest* v. *Lord Camoys* (1).

The settled estate here is an estate settled by the will of the late Earl, who was owner in fee simple. It consists of the lands to which these chattels are annexed as heirlooms. Those lands are, first, the *Longford* estate and the *Pucklechurch* estate, together called the *Wiltshire* estates, *Longford Castle* being the capital mansion on the *Longford* estate; and, secondly, the *Folkestone* estate and some real property in *London*. The total net income of these properties, apart from incumbrances, may be taken in round numbers as being from £20,000 to £21,000 a year. The present Earl has other property, to which I will presently refer; but I stay here to observe that estates settled by the will of the late Earl are the principal, if not the sole, subject of consideration, and that it is to the interests of the persons entitled under the limitations of that will to which regard must be had. The limitations may be stated shortly as a strict settlement in the male line, so that the estates devolve with the earldom. The present Earl is the tenant for life in possession with remainder to his eldest son, Viscount *Folkestone*, for life. The Viscount is now about twenty-two years of age, and is unmarried. Subject to these two life estates, the remainders are as follows: remainder to the first and other sons of the Viscount in succession in tail male; remainder to *Stuart*, the second son of the present Earl, an infant now twelve years of age, for life; remainder to his first and other sons in succession in tail male; remainder to the other sons of the present Earl in succession in tail male (the Earl is about forty-seven years of age, and has no other son at present); remainder to the Earl's next brother, the Respondent *Duncombe Pleydell Bouverie*, for life, with remainder to his sons in succession in tail male; remainders similarly to the Earl's brothers, *John*, *Mark*, and *Kenelm*, in

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succession for life, and their sons successively in tail male. There is no tenant in tail in existence, and the reversion in fee simple is vested in the Earl. These are the main limitations of the settlement. In front, however, of all these limitations there stands a long term of years, the trusts of which are to raise money in aid of the late Earl's personal estate for the purpose of paying his debts, funeral and testamentary expenses, and the legacies bequeathed by his will. Under the trusts of that term a sum of no less than £100,000 has been raised by mortgage of the settled estates, and it may be necessary to raise more. The debts of the late Earl, as was stated and admitted in Chambers, amounted to about £80,000. The trusts of the settled heirlooms follow the limitations of the real estate, subject however to the usual and necessary restriction by which the chattels vest absolutely in a tenant in tail by purchase. Consequently the chattels, subject to the prior life estates of the Earl and the Viscount, will vest absolutely in the first son of the Viscount who attains twenty-one, and failing such son they will vest absolutely in the first son of the brother *Stuart* who attains that age, subject to the prior life estates.

I have heard from the trustee's counsel an elaborate argument founded on the testator's intention; I heard a distinction drawn between what was called the primary intention and the secondary intention, or the general intention and the particular intention of the testator. It appears to me that considerations of that kind have but little weight, because unquestionably if the intention of the testator is to be looked at a tenant for life cannot sell at all. But it is the Act of Parliament which, upon grounds which appeared to be sufficient to the Legislature, has enacted in contravention of the testator's intention that the tenant for life may sell the settled property. It has by sect. 3 empowered him to sell the fee simple of the land of his own free will, without the consent of the trustees or any order of the Court; by sect. 15 to sell the principal mansion-house either with the consent of the trustees or an order of the Court; and by sect. 37 to sell the heirlooms if he obtains an order of the Court. These are permanent powers, wholly independent of and overriding the settlor's intention. They cannot be taken away from the tenant

for life by the settlor; any attempt on the part of the settlor to prohibit or restrict the exercise of these statutory powers is by sect. 51 made void. Nor can the tenant for life contract himself out of the powers (sect. 52). So great is the confidence reposed by the Legislature in the tenant for life, that it has entrusted to him the right of selecting out of the various statutory purposes to which capital money may be applied the particular purpose to which it shall be applied (sect. 22). It leaves it to him to submit to trustees or the Court a scheme of improvements which, though considered beneficial to the estate, are of less permanent character than the improvements which were held by the old Court of Chancery to be "lasting improvements." In regard to the trustees, they are free from responsibility for giving their consent to the sale of the mansion, or to a scheme of improvements, or any other consent under the Act (sect. 42). I mention these provisions for the purpose of shewing the extent to which the tenant for life has powers overreaching the settlement and the intention of the settlor. Without going so far as to say that his intention must be wholly laid aside, I do not see how it would be right to do more than to take it into consideration as one of the general circumstances of the case.

I desire to repeat here what I have said before, that this controlling power of the Court is a discretionary power, and that it must be exercised with regard to all the circumstances of each particular case, anxious attention being given to the said circumstances, which vary greatly. For myself I say emphatically that this discretion ought not to be crystallized, as it would become in course of time by one judge attempting to prescribe definite rules with a view to bind other judges in the exercise of the discretion which the Legislature has committed to them. This discretion, like all other judicial discretions, ought as far as practicable to be left untrammelled and free, so as to be fairly exercised according to the exigencies of each particular case.

Now, having made these general observations, I proceed to inquire which members of the family object to the present application. Lord *Radnor*, the tenant for life, asks that the order may be made; his eldest son, the next in succession, supports him. Though I think it right, as I have stated, that

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due regard shall be had to the interests of all entitled under the settlement, yet I think that it is right to give more weight—I cannot say exactly what weight—to the interests of those who stand first and second in the order of succession than to the interests of those who stand more remote. As in many things where discretion has to be exercised, it is impossible to appreciate—and I do not intend to appreciate—the exact amount of weight that ought to be given to the interests of those who stand first or second, and of those who come later. All I can say is, that I think the earlier interests ought to be considered first, seeing that they stand first in the order of succession. This view is founded on the Act which has placed such large powers in the hands of the tenant for life in possession. It appears to treat him as the head of the family—as, in fact, he generally is—and it has placed in his hands a large portion of the dominion over the settled property, the principal restriction being that he cannot put capital money into his own pocket. In order that those members of the family who objected to the sale might have the opportunity of being heard, I directed (as already stated) that Mr. *Duncombe Pleydell Bouverie* should be served. He has appeared by counsel and opposed the application. It was not necessary, nor was it expedient, that any one else should be served. But the counsel for Mr. *Duncombe Pleydell Bouverie* told me that he was really opposing in accordance with the wishes of the other members of the family, the other sons of the late Earl, and even of the daughters, who have no interest. Amongst those whose names he mentioned as desiring to oppose was Mr. *Kenelm Pleydell Bouverie*, who, strange to say, is a party to the provisional contract, and has thereby agreed to contribute more than half of the purchase-money. By entering into the contract he has consented to the sale, and apparently he has since changed his mind. But his consent or dissent is really not material. His consent is not required by the *Settled Land Act*. That Act was an entirely new departure, differing in principle from the *Settled Estates Act*, which required in substance that every person interested down to and including the first tenant in tail should either concur in the application or be before the Court.

Now, on the question of the propriety of the proposed sale I do not propose to examine in detail the accounts which have been presented on behalf of the Earl. I have the figures sufficiently before me. Critical observations on the amount of the net income and the expenditure have been made by the counsel for the trustee. But questions of this kind must be looked upon broadly. I will take one item on the expenditure side which was commented upon adversely, the sum of £13,000 a year, which is put down as the expenses of keeping up *Longford Castle*. The Earl gives that as the estimate of the proper expenditure, and there is no evidence to shew that it is an extravagant estimate; it appears to be a splendid place, and I see no ground for holding that it is an extravagant sum for such a place. The question is not what sum would be deemed sufficient by a gentleman of small means, but what is fair and reasonable to enable the place to be kept up in a manner worthy of the estate and dignity of an earl. I consider that I ought not to disregard the ordinary customs of social life in matters of this kind. The Earl says very candidly that £13,000 is required, and this takes at once a very large sum out of the income of the settled estate. Then the Earl makes voluntary and other allowances to a considerable yearly amount. He makes an allowance of some hundreds a year to his eldest son; it is not necessary to state the exact sum. But here I come upon a point which appears to me one of considerable importance: the eldest son is unmarried, and the Earl says in substance that his present allowance is the maximum that he can afford to make to him. I have no right to dictate to the Earl what allowance he should make; it is beyond my province to say whether it is reasonable or not. But the Earl points out that his eldest son has come to an age when he may reasonably entertain prospects of matrimony, and it must be remembered that in a family of this kind with a title, or in any family of high position, the eldest son, who in the ordinary course of events will succeed to the title, is not expected to wait until his father's death before he marries. The substance of the case on his part is that the son's prospects of marriage will be considerably impaired unless this sum of £55,000, the price proposed to be given for the pictures, can be acquired for

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the estate, and a larger income obtained by paying off a portion of the £100,000 mortgage. Much has been said in argument by those who oppose the sale about the interests of the unborn tenant in tail. I am unable to see how it is to his interest to remain unborn. But, speaking seriously, I think that the Earl may reasonably and legitimately consider it a matter of importance that his eldest son should be able to take his position in society whilst he is a young man, and I can readily understand that from a family point of view it would be better that he should marry soon.

A point strongly pressed against this application was the allegation that the Earl has been driven to have recourse to a sale of the heirlooms by his own incumbrances. Now, as a general rule, I think that the circumstance that the tenant for life has incumbered his life estate under the settlement ought to be excluded from consideration by the Court on a question of granting or refusing an order sanctioning a sale of heirlooms. I so held in the cases of *In re Duke of Marlborough's Settlement* (1), and *Re Beaumont's Settled Estates* (2). But any such general rule has no application to the present case. The incumbrances created by the Earl are on his life estate under an entirely different settlement. I cannot see how the fact that the tenant for life, apart from the settlement in question, is richer or poorer, is material. I do not understand that this Act of Parliament puts the Court upon inquiry into the past life of the tenant for life, or requires the Court to investigate his previous career to ascertain whether in matters not relating to the settlement he has been prudent or imprudent. The Earl explains how he came to incumber his life estate in the property comprised in his marriage settlement; but I am not concerned to consider his explanation. It is a matter foreign to the settlement under his father's will; but I can well understand him, with his past experience, seeing and appreciating keenly the evil of allowing his eldest son, the expectant heir, be it remembered, to an earldom, to be in society without what he considers a sufficient income. That is a family matter unquestionably; but it is a family matter upon which I think the head of the family (I am

(1) 30 Ch. D. 127; 32 Ch. D. 1. (2) 58 L. T. (N.S.) 916.

not in any sense usurping his position) may rightly entertain a strong opinion.

The case, therefore, thus far stands thus: the head of the family and his eldest son, who comes next in the succession, consider that the sale ought to be made. I find no reason for thinking that this is not an honest and *bonâ fide* application made to the Court in the interests of the family. I place the interests at any rate of these two members of the family higher than those of the other members, whose chance of succession is remote. I am not going to enter minutely upon the question of the value of the settled land, or to compare it with the value of the settled heirlooms except in a general way; the materials before me do not enable me to do more than give an approximate opinion. I do, however, know enough to see that the chattels bear a very large proportion in value to the settled lands. The proposal is not to sell all the chattels. The collection of pictures annexed to the estate includes altogether 279 pictures; some may be away from *Longford Castle*, but the greater part of them are there, and it is to *Longford Castle* that they are annexed as heirlooms; three pictures out of 279 are to be sold. I quite agree that this is not an exhaustive mode of considering the question, because the three pictures may be the gems of the collection, and the taking away of them may injure the rest of the collection—that is to say, people would care less to go and see the collection; part of the attraction might be gone. But any diminution in the interest of visitors to the castle is not a matter with which I am concerned. Unquestionably these three pictures are three of the best, and I take the trustee's statement in his affidavit that he has been "informed" (that is what he says) that they are the three finest and most valuable pictures in what he describes (apparently with perfect accuracy) as "the extensive and well-known collection in *Longford Castle*." Now, in a case of this kind it would be absurd to go to the expense of having the whole collection valued; the cost of a valuation would be altogether disproportionate to the assistance which the valuation would afford to the Court. These pictures represent only a fraction (what fraction I cannot say) in value of the whole collection. I cannot take as final the suggestion I find in the

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affidavit of the solicitors to the effect that the value of the three pictures is about one-ninth of the whole collection; but there is nothing against it. Although I would not accept that as a fact upon which to found my judgment, I am unable to say that it is an unfair statement. At any rate, alter the fraction, and say an eighth, a seventh, a sixth, or even a larger fraction, it is clear that it is not a large proportion in value of the whole. The catalogue has been produced, and no question has been raised as to its accuracy; it was accepted as correct. It appears that there will remain in the collection many pictures that bear the names of great painters. Something by way of suggestion, but without evidence, was said as to the genuineness of the pictures, and probably some such suggestions, with more or less foundation, may be made on any gallery of paintings. Setting aside the mere suggestions of counsel, it appears that there will be left in the collection twelve *Holbeins*, one *Velasquez*, three *Titians*, four Sir *Joshuas*, one *Murillo*, two *Rembrandts*, one *Raphael*, two *Gainsboroughs*, six *Rubens'*, two *Claudes*, two *Guidos*, nine *Vandycks*, four *Albert Dürers*, and one *Michael Angelo*. So the matter stands upon the catalogue, and I cannot accede to the argument that the taking away of these three pictures will spoil or ruin the collection.

There are some further facts, not to my mind of leading importance, which may be referred to in considering the position of these family estates. It is quite true, as was said, that in a few years—that is, in four years from the death of the late Earl—the succession duty charged will have run off; but it must be borne in mind that in place of the succession duty, and at no distant time to come, other charges may become chargeable on the estate; for instance, a sum of no less than £5000 a year by way of jointure, and sums amounting to £40,000 by way of portions to younger children. Further, although I do not treat the testator's intention as a matter of primary importance, it is noticeable that by his will the testator included other real estate, producing several thousands a year, in his devise to which the heirlooms are annexed. But subsequently, by codicil, he gave this real estate to a younger son. In this way and by the charge of the £100,000, the income of the estates

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settled to accompany the earldom has been very considerably reduced.

When a tenant for life, in proposing to sell heirlooms, is attempting to use his power maliciously, or to spite his successor (such cases, I am sorry to say, have occurred), or where he is acting wantonly or capriciously, the Court would undoubtedly decline to sanction the sale. Nothing of the kind has been or could be suggested in the present case. The Earl, as the head of the family, with the consent of his eldest son, is willing to deprive himself of the enjoyment to be derived from these three pictures; he is desirous of turning them into money to relieve the estate partially of the heavy charge of £100,000; he has assigned the grounds upon which he proposes to act. I cannot find that they are unreasonable. The contract is to sell for £55,000, and as for the price, I have not heard a word against it. It seems to me that the estate is getting a good price, and a price which at some future period it might not be able to obtain. Price in the future is mere speculation; as the wealth of the world increases, the value of the works of the old masters goes up; but it would fall if great wars or other catastrophes happened to diminish the wealth of the world. My conclusion is, that I consider that the controlling discretionary power vested in the Court will be well exercised in the circumstances of this case by granting the order asked for.

During the argument I called attention to the fact that there was but one trustee, and to the provisions of sect. 39 of the Act, as to his power of giving a receipt for the purchase-money. It appears that under the settlement a sole trustee has power to give receipts for "capital trust money of the settlement," and the provisions of the section therefore apply.

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The surviving trustee of the will, and the other opponents of the application, appealed from this judgment, and the appeal was heard on August 5 and 6, 1890.

Sir *Horace Davey*, Q.C., and *Samuel Dickinson*, for the surviving trustee:—

There is no ground for the proposed sale, and the consent of

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the Court ought not to be given to the application, which is made in the interest of the tenant for life and his elder son. The judgment of Mr. Justice *Chitty* limits too much the grounds for interference with the exercise of the discretion of the tenant for life. The test is, not whether the proposed sale is or is not unreasonable, but whether the circumstances of the particular case are such as to render a sale of chattels for the benefit and the advantage of all persons entitled under the settlement. In considering the action of the tenant for life, the Court must exercise a judicial discretion, giving no more weight to the wishes of the tenant for life and his immediate successors than to those of persons more remotely entitled; in strictness, no consideration should be given to the mere wishes of any party, but regard should be had to the real interests of all parties affected. The interest of the tenant for life is, of course, a factor to be considered, but not a conclusive one; and the mere insufficiency of his income is no ground for sanctioning the proposed sale.

Latham, Q.C., and *Theobald*, for the Hon. *Duncombe Pleydell Bouverie* and other remaindermen, argued to the same effect.

Romer, Q.C., and *W. C. Druce*, for the tenant for life:—

The Court will confirm the proposed sale if it is of opinion that under all the circumstances of the particular case the tenant for life has not acted unreasonably in the exercise of his discretion. The tenant for life, being a trustee with a power of sale subject to the control of the Court, must give due consideration to the interests of all parties, himself included, and must not be dominated by the interests of one; but it is no objection, that in acting to the best of his judgment for the benefit of all the *cestuis que trust* some one of them, more or less remotely entitled in remainder, may possibly be injured; as the head of the family, the tenant for life must act in the interests of the family as a whole. The Court when called upon to exercise its judicial discretion of allowing the sale will not give undue weight to the possible injury to the interests of a remote remainderman, but will consider whether the tenant for life has made a

reasonable exercise of his discretion in the general interest of all parties.

Sir *Horace Davey*, in reply.

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In this case under the will of one of the Earls of *Radnor* two estates were strictly entailed, and by the same will certain heirlooms—a very large number of articles, including pictures, furniture, and jewels—were devised to follow the estates, or one of them; it signifies not which. The testator is dead, and the present Earl of *Radnor* is tenant for life of the estates. He upon consideration, and a fair and honest consideration, of the condition of his family as a whole, including himself, came to the opinion that it was desirable to sell three of the most valuable pictures of a very large collection, which three pictures are part of the heirlooms. He so considered, and he consulted with his eldest son, the present Lord *Folkestone*, who is the next tenant for life, and Lord *Folkestone* agrees with his father that this would be advisable for himself and his father and for the rest of the family.

The right of Lord *Radnor* to act in this way depends upon the *Settled Land Act*, 1882, and upon sect. 37 of that Act. If it were not for that Act, he could not, of course, sell these heirlooms. He is tenant for life of the heirlooms just as he is of the estates; and, no doubt, the wish of his father, the testator, who made this settlement, as manifested by his will, was that the heirlooms should not be sold by the tenant for life; his desire was that they should go with the estates, and, I suppose, that the estates should go with the title. Of course, whether there is a title or not is immaterial; but he intended that the heirlooms should go with the family estates. But Parliament has in these later years considered that it is advisable that a person who comes into landed estates, or who comes into heirlooms which are to go with landed estates, should be able to depart from the will of the testator: that is the obvious intention of the Act of Parliament. But then the Legislature did not intend that he should do so capriciously or selfishly or dishonestly; it put a fetter upon him.

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Although it gave him the liberty of doing that which according to the will he ought not to do, Parliament has, for reasons which seemed to it advisable, in allowing a tenant for life to sell the land, to sell even the family house and to sell heirlooms, placed a certain fetter upon that power. It is provided by sect. 37 that "where personal chattels are settled on trust so as to devolve with land until a tenant in tail by purchase is born or attains the age of twenty-one years, or so as otherwise to vest in some person becoming entitled to an estate of freehold of inheritance in the land, a tenant for life of the land may sell the chattels or any of them." That section gives the tenant for life a discretion to sell; and, even if it stood alone, he ought to exercise that discretion honestly. Then comes the fetter in sub-sect. 3: "A sale or purchase of chattels under this section shall not be made without an order of the Court." Therefore, you must have first the discretion, when it is a matter of sale, of the tenant for life exercised to this extent, that he thinks in his discretion that the heirlooms ought to be sold, or some of them. But he cannot sell them without something else: he is to take the first step; he is to determine that they shall be sold, and then a sale under this section shall not be made without an order of the Court. Therefore, in order to make the sale effective, there must be the concurrence of the tenant for life and the Court.

Now, let us see whether there is anything in the Act which will shew us how this discretion of the tenant for life and the discretion of the Court, or, if you please, the combined discretion of the two, ought to be exercised. I think that sect. 53 does so: "A tenant for life shall, in exercising any power under this Act"—that includes the power under sect. 37—"have regard to the interests of all persons entitled under the settlement"—he shall have regard to the interests of all—"and shall, in relation to the exercise thereof by him, be deemed to be in the position, and to have the duties and liabilities, of a trustee for those parties;" and when the section says he is to be deemed, for the purpose of exercising his discretion under sect. 37, to be a trustee for all parties, I think that that includes himself as one of the *cestuis que trust*. He is, consequently, put in the position of a trustee for himself and all the others—not for himself or all the

others, or each of all the others, but for himself and all. It seems to me, therefore, that he is bound in the first place to exercise his discretion as if he were an independent trustee for himself and all the other members of the family—that is, he is to exercise his discretion as a fair and honest and careful trustee would under the circumstances; and the Court ought, I think, to view the matter precisely in the same light. It may be that the tenant for life, acting with perfect *bona fides*, with perfect honesty, and with all the care that he can bring to it, may resolve in the particular circumstances of a given case to do something which the Court may think he should not do; in such a case the Court, differing from the view which he has taken, ought not to allow the thing to be done. It is not that the Court is a mere appeal from him, but both he and the Court are to come to the opinion, the Court being the superior, or at any rate the master of the situation to this extent, that the thing cannot be done without its consent.

The tenant for life, then, has in the first place to exercise his discretion in the way I have said, in the case and at the time and under the circumstances (I say that advisedly) in which he is placed. He must take all the circumstances of the family, and of each member of the family who may be affected by what he is about to do; he must consider them all carefully, and must consider them in the way that an honest outside trustee would consider them; then he must come to what, in his judgment, is the right thing to do under the circumstances—not the best thing, but the right thing to do. When I say "not the best thing," I mean this: if somebody afterwards comes and says, "Although you have done what nobody can say is wrong, yet somebody else might have found out a better way of doing the thing," that would be immaterial. If it is the right thing, when the Court comes to consider the matter, I think that it (I am speaking of the Court of first instance) ought to consider the matter in precisely the same view. The Court cannot have the same knowledge of the family in every respect that the tenant for life, the head of the family, has; therefore I should think that, if the Court considered the tenant for life had been acting honestly, it would take careful note of the fact that it was his discretion;

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and in a case where he, the head of the family, interested in the whole matter, had come to the conclusion that his discretion ought to be exercised in the sale, it would not lightly differ from him. In cases, however, wherever the Court did differ from him upon the question of fact, upon the question of the exercise of his discretion under the circumstances of the case, what would happen would be that the sale could not take effect, because the two concurring parties to the validity of the sale would not have agreed. Therefore, if the test is to be the view which an honest outside trustee would take, it is obvious that he must take it with regard to all the circumstances of each particular case, and it is impossible, and would, I think, if possible, be wrong, to lay down any rule which should say, by way of matter of law and direction, that a particular tenant for life cannot do in his own case a particular thing because the Court in another case thought that that particular thing should not be done. I agree with Mr. Justice *Chitty*, that the discretion of the Court should not be fettered in any way whatever. It is obvious that there must be things which no trustee acting honestly could properly do; therefore, where that same difficulty arises, the decision must be the same in every case, but there is no use in laying that down as a matter of law.

I think, therefore, that the passage in the judgment of Mr. Justice *Chitty*, in which he lays down the mode in which the law is to be exercised in the Court of first instance, is correct. "I desire," he says, "to repeat here what I have said before, that this controlling power of the Court is a discretionary power, and that it must be exercised with regard to all the circumstances of each particular case, anxious attention being given to the said circumstances, which vary greatly. For myself, I say emphatically that this discretion ought not to be crystallized, as it would become in course of time by one judge attempting to prescribe definite rules with a view to bind other judges in the exercise of the discretion which the Legislature has committed to them. This discretion, like all other judicial discretions, ought, as far as practicable, to be left untrammelled and free, so as to be fairly exercised according to the exigencies of each particular case." I agree with every word of that, and say that that is the right

rule. I have endeavoured to explain it in other words of my own—not better than those, perhaps differing a little, but coming to precisely the same conclusion; it is all the circumstances of the case that have to be considered. I think that a fair and honest trustee would look at it thus—"Is it right, under the circumstances of the particular case before me, that at this time and under these circumstances the heirlooms, or the part of them which it is desired to sell, ought to be sold at all?" There may be cases in which they ought not, and I should think that a fair and honest trustee would lean against selling the heirlooms; for I agree with Sir *Horace Davey* that *primâ facie*, unless something in the circumstances justifies it, an honest trustee would be inclined to keep the heirlooms where the person who has settled them desired that they should be kept; therefore the leaning would be against a sale.

But that is not all. If the trustee has to consider whether he would sell—I mean a trustee for the tenant for life as well as for all the others—he must take into consideration the circumstances of the tenant for life; he would take them into consideration as the head of the family; and it is most material that the head of a great family, or of any family, should be in a position to do his duty to the whole family. Therefore, it is impossible to put out of consideration the circumstances of the particular tenant for life. If he cannot keep up the family property, if he cannot live in the family house without some assistance from the sale of the heirlooms or any part of them, that ought to be taken into consideration, and very much into consideration. The position of the next tenant for life—the one, that is, who comes in next to the tenant for life himself—is very material, and it ought to be considered what will be his position if he comes in. Will he be able to keep up the family property? Will he be able to keep up the place as head of the family, which he will be? Next after him, of course, will come his children; even though they are not born, they are to be considered. After that, but certainly it cannot be said with the necessity of dealing with them precisely in the same manner, will come the others who may become tenants for life under the settlement; you must consider them all. It is not that you are

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to consider each of them separately; you are to consider each of them separately in one sense, but you are to consider the whole position of the family altogether. Therefore, circumstances may arise with regard to them all which will justify the exercise of the discretion, although, if you were considering the case of only one of them you would not allow it.

I would say this: supposing the tenant for life who is to exercise the discretion is a man of wealth *aliunde* or outside the property which is under the settlement, and with regard to which he has a discretion, and he therefore, by means of his other property, can keep these family estates and heirlooms all intact, that would be a strong reason, if something else did not exist, why a trustee would say: "No, I lean against your selling the heirlooms; you can keep them up; therefore I, in the exercise of my duty, say that you should not sell them." But suppose, taking into consideration the wealth belonging to the existing owner of the life estate, that wealth which does not belong to those estates would necessarily depart from him the moment he died, so that his heir, his son, would not have it; suppose that without that wealth it would be obvious that the family estate could not be kept up in the hands of the son, and suppose that an exceptional offer for some of the heirlooms or all of them, were made to that tenant for life—an offer which probably would not arise in the time of his successors if allowed to pass by—in such a case a trustee would fairly say: "I think, although I would not let these things be sold now if I considered only him, yet when I come to consider his heir, if I let this exceptional offer go by he will not be able to sell them for anything like the same sum, and when he comes in he will not be able to keep up the family property so well as if I sold now." Then take the case of the tenant for life himself, by reason of any circumstances you please, not being able during his life to keep up the family estate, and supposing that the circumstances of the property are such that he is not able to keep it up, and that his son will not be; if that be so, would not an honest trustee, or might not an honest trustee, say: "I must take into account the position of the present tenant for life; I must take into account his age; I must take into account how long he

will probably be tenant for life; he is the head of the family; what will become of the family, supposing they are quite young and in want of the assistance which the head of a family can give—I must take all that into account; and if I do not allow this sale, even though the property may recover in the hands of a successor, it would all be in abeyance during the whole of his life, and his family, the very people who are to succeed him one after the other, will not have the same advantages during the whole of his life which they would have if they are allowed to sell." I think such circumstances as those would be taken into consideration; and under those circumstances an honest trustee would say, "I will allow these to be sold, so that the money will be in his hands for the time; that will not deprive the subsequent heirs of anything of value; they will get the full value of the thing sold; the money which is the produce of the sale will go to them just as the thing itself; therefore, I think, in the exercise of my discretion, I shall take those circumstances into account, and exercising my discretion I shall direct the sale if the Court agrees with me." Then, when it comes to the Court, the Court will take all the circumstances of the particular case into account—such circumstances as I have enunciated by way of example, and which are not within a hundredth part of being all the circumstances which might arise in each particular case—and having taken them all into consideration the Court would take care that no absolute injustice was done to any one. But the Court would take into account this—that it might be less beneficial to one than to another; it would take all the circumstances of the family with due care into consideration, and would act as an honest and careful trustee would in agreeing to the discretion which has been first exercised by the tenant for life. If the Court agreed with him, it would allow the sale; if it disagreed with him, it would say, "We disagree, although we do not say that you in your view were wrong; we have nothing to do with that; but we do not agree with you, and there cannot be a sale."

That is, I think, the position of the Court of first instance. When you come to the Court of Appeal there is the greater burden on those who object to the mode in which the discretion of

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the tenant for life and the discretion of the Court of first instance, the joint discretion of the two, have been exercised. Those who come and object then are under the usual obligation of an appellant from a Court; they have the burden in the Court of Appeal of shewing, and satisfying the Court, that the joint discretion of the tenant for life and the Court has been exercised wrongly; and unless they do that the Court of Appeal must adopt what has been done.

Now, in the present case the tenant for life, admittedly desiring to act with perfect *bona fides*, has exercised his discretion, and thinks there ought to be a sale of—what? A sale of three pictures out of 279 pictures, of three heirlooms out of a vastly larger number than 279 heirlooms, regard being had to the furniture and jewels subject to the settlement; and as to those three articles the discretion has been exercised, as it may properly be, by saying that they should be sold. In the Court below Mr. Justice *Chitty*, about whose care there cannot be a question, has thought that, under the circumstances of this family as it exists at this time, and considering what it is that is desired to be sold as compared with what is not to be sold, and considering the price which is to be obtained for what is to be sold, and taking into account also that the eldest son, who is not married, yet desires to be married, and seeing obviously from figures that if he is married he ought to have a very considerable allowance, has allowed the sale. I do not say that this marriage would be prevented if this were not done; I take no note of that; but the eldest son ought, if he marries, to have, as the heir of such a family and of such a title (for that must be taken into account), a very considerable allowance. Considering that by this sale his father, the tenant for life, will be put into a position of either binding himself to make a larger allowance or agreeing to make a larger allowance, seeing that it is obviously for the advantage of the son, and that he, the next tenant for life, agrees with the present tenant for life as to the advisability of this being done, and not being able to see that the doing of it can in the least way really injure the unborn child of Lord *Folkestone*—those are material facts to justify what has been done. Being unable to see in this case that any injury whatever of any

kind will be done to any of the future tenants for life, except to the sentimental desire of having the pictures, it seems to me that there is in this case as clear a case as ever was or could be to shew that the Court was justified, and I say no more, in agreeing with the exercise of the discretion by the tenant for life. It is as clear a case as possible that the Court was justified in agreeing, and there is not a single point of valid argument which can be suggested why Mr. Justice *Chitty* should not have come to the conclusion which he did. Under those circumstances, certainly the burden of proof in this Court has not been satisfied by the Appellants. One of the Appellants was the surviving trustee of the will; he and the other Appellant were perfectly entitled to take the opinion of Mr. Justice *Chitty* as to what was right to be done; but when they appeal to this Court from him, being absolutely protected as trustees by his decision —I do not say they are wrong in appealing, but they appeal to this Court under the ordinary conditions of Appellants, and they fail in the appeal; therefore this appeal must be dismissed with costs.

LINDLEY, L.J.:—

I am of the same opinion, and should have confined myself to a simple concurrence in the judgment of the Master of the Rolls, but for the fact that the case raises a question of some importance as to the construction of the statute.

The power to sell heirlooms is given to the tenant for life; but he must exercise this power as a trustee for all parties entitled under the settlement; and no sale can be made without the order of the Court; that is the effect of sects. 37 and 53. Two questions thus arise: firstly, what is the duty of the tenant for life; what limit is set to his power? Secondly, what is the function of the Court?

The duty of the tenant for life is *bonâ fide* to exercise the power for the purpose for which it is conferred, and to have regard not to his own interests only, but to the interests of all persons entitled under the settlement. This is clear not only from sect. 53, but also from sect. 21, which provides for the application of the capital money. But it must be borne in mind

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that he is like a trustee with a discretionary power to sell: he is not subject to an absolute trust either to preserve or to sell the heirlooms. He cannot be compelled to sell; he must decide on the above principles whether he will sell or not; and if he does he must sell as any other trustee must sell, with due regard to the interests of all persons entitled to the settled estates. But the more remote their title, the less their interest in the matter; and the interest of any one liable to be cut off by a tenant in tail is entitled to little weight.

Next, as to the function of the Court. Before the Court can properly sanction any proposed sale it must be satisfied that such sale is reasonable and proper; and before coming to any conclusion one way or the other the Court ought to have regard to the interests of all parties entitled under the settlement. Whether having regard to these interests any particular sale is reasonable and proper must depend on all the circumstances of the particular case. The views of the tenant for life naturally count for much; the views of those who differ from him ought not to be excluded from consideration. But the more remote the chance of succession the less the importance of the interest to be regarded. The Court is trusted with a discretion, and I decline to fetter it by attempting to lay down any rule or principle which may fetter or tend to fetter its exercise. Supposing that there should be a conflict of interests or of views in any particular case, the Court would not be necessarily paralysed; it might still exercise its discretion and sanction a sale. The Legislature has taken for granted that the Court will act as every Court ought to act, and this is all that I have endeavoured to express by saying that the Court ought to be satisfied that a proposed sale is reasonable and proper.

The protection thus afforded to unborn children and to remaindermen is very much greater than that afforded by sect. 53 or any other section in the Act. The tenant for life must obtain the sanction of the Court. An injunction might be applied for too late; and any remedy in the shape of compensation from the tenant for life or his estate for any breach of trust by him might be illusory.

The view taken by Mr. Justice *Chitty* as to the power and duty

of the Court in cases of this description is, I think, correct, and the appeal ought to be dismissed.

BOWEN, L.J.:—

I concur.

Appeal dismissed.

Solicitors: *Wickham, Moberly, Tylee, & Wickham; A. C. Curtis-Hayward; Bompas, Bischoff & Co.*

W. J. B.

FRY, L.J.
1890
July 29.

ADAMS *v.* ADAMS.

[1889 A. 818.]

Will—Forfeiture Clause—Interfering with Management—Frivolous Action against Trustees.

A testator gave his freehold estate at *R.* to two trustees in trust to pay certain annuities to the Plaintiff during his life, and after his death for the Plaintiff's unborn sons in fee; provided always that if the Plaintiff should in any way intermeddle or interfere with or attempt to meddle or interfere with the management of the testator's real or personal estate the said annuities should immediately cease. And the testator gave the residue of his real and personal estate to his daughter *E. A.*, who was one of the trustees. *E. A.* entered into possession of the estate at *R.*, and paid the annuities regularly to the Plaintiff; but the Plaintiff brought an action against the two trustees, alleging that his annuities had not been paid, that *E. A.* had wasted the estate, and that the buildings were out of repair, and claiming an account, an injunction, and receiver. The Court held on the evidence that none of the charges against the trustees were established:—

Held, that the action was groundless and frivolous, and was an attempt to interfere with the management of the estate, and that the Plaintiff by bringing the action had forfeited his annuities.

THIS was an action by *Henry Adams*, an annuitant under the will of his father, *Richard Adams*, against the trustees of the will.

The testator by his will devised his freehold farm and cottages called the *Rydon* estate, in *Devonshire*, to his daughter *Emily Adams*, and *Charles Adams*, in fee, upon trust to pay out of the rents thereof an annuity to his wife for life, and certain annuities to the Plaintiff for his life, and after the death of the survivor to stand seised of the said hereditaments upon trust for the Plaintiff's unborn sons in fee with remainder over; provided always, that if the Plaintiff should in any way intermeddle with or interfere in, or attempt to intermeddle with or interfere in, the management of the testator's real or personal estate, or if he should commit or suffer any act or default by means whereof but for this proviso the said annuities would become payable to any other person, the said annuities should immediately cease. The testator also devised to *Emily Adams* and her heirs other lands,

and charged the same with the payment of his just debts whether secured by mortgage or otherwise, and in exoneration of all his other lands. And the testator devised and bequeathed to his daughter *Emily Adams* all his rents and profits, and also all his real and copyhold lands and hereditaments not thereinbefore otherwise disposed of, and all his residuary personal estate.

The *Rydon* estate was subject to a mortgage for £500.

The testator died on the 29th of November, 1861, and the will was proved by *Emily Adams* and *Charles Adams*, who were the executors named therein. The Plaintiff was the testator's only son and heir-at-law. The testator's widow died in May, 1876. The Plaintiff had no male issue. *Emily Adams* entered into possession of the *Rydon* estate. The Plaintiff brought the present action against the two trustees, alleging that they had not paid him the annuities under the will; that they had neglected the care of the estate, and wantonly broken down the cottages and felled the trees, and that the *Rydon* estate was being wasted and the buildings destroyed, so that the rents had become insufficient for the payment of his annuities. He also alleged that he had been deceived by the trustees as to the terms of the will, and that he was entitled to some further interest than the annuities. He also raised a point upon the construction of the will to which it is not necessary further to refer, as the Court held it was entirely untenable. He claimed a declaration as to his rights under the will, and to have the mortgage on the *Rydon* estate paid off; to have accounts against the trustees on the footing of wilful default; an injunction to restrain Defendants from appropriating the trust moneys or occupying the trust estate for their private benefit, and from committing further waste; and a receiver. He also asked to have the Defendant *C. Adams* removed from the trusteeship. The Defendants in the defence alleged that they had paid the Plaintiff the whole of the annuities due to him, and they denied that the estate was wasted or the buildings out of repair, or that the rents were insufficient to pay his annuities for the future.

The Defendant *Emily Adams* also put in a counter-claim in which she alleged that the Plaintiff had intermeddled and

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interfered with the management of the testator's real estate; and stated several instances in which he had obstructed and annoyed her in the possession and enjoyment of the *Rydon* estate; and alleged that he had even caused the trustees to be arrested on a warrant for being in wrongful possession of the property. She further pleaded that the Plaintiff's claim in the present action was an attempt to interfere with the management of the real estate. She, therefore, claimed a declaration that the annuities given by the will to the Plaintiff had ceased.

The action came on for trial before Lord Justice *Fry*, sitting as an additional Judge of the Chancery Division.

Both parties entered into evidence.

The Plaintiff, who had obtained an order to sue in *formâ pauperis*, but had dismissed his solicitor, appeared in person. He contended that the evidence shewed that the annuities had not been paid in full, and that he was entitled to an account; that the Defendant *C. Adams* ought to be removed from the trusteeship; that the property had been allowed to fall into bad repair; and that he was entitled to an injunction and receiver, and that the mortgage debt ought to be paid off.

Clare, for the Defendant *C. Adams*.

H. M. Humphry (*Warmington*, Q.C., with him), for the Defendant *Emily Clare*:—

The evidence clearly proves that the Plaintiff has received his annuities in full, and he is therefore not entitled to an account. It is also conclusively shewn that the property at *Rydon* is not wasted, but that the buildings have been kept in good repair, and that the rents and profits are quite sufficient to keep down the interest of the mortgage as well as to pay the annuities in full; therefore he is not entitled to an injunction or a receiver nor has he made any case for the removal of *C. Adams* from the trusteeship.

With respect to the counter-claim, we do not rely upon the personal acts of annoyance and interference of which the Plaintiff has been guilty, because the annuities have been paid subse-

quently to those acts, and they may have been condoned. But we rely upon the bringing of this action as a forfeiture. It might have been different if this action had been brought *bonâ fide* for the protection of his annuity. In *Powell* v. *Morgan* (1) it was held, on the construction of a somewhat similar clause, that the bringing of an action was not a forfeiture, because there was *probabilis causa* for the suit; but this action is perfectly frivolous, and brought merely for the annoyance of the trustees. *Webb* v. *Webb* (2) is in our favour.

The Plaintiff, in reply.

FRY, L.J. (after disposing of the point of construction, held, that there was no ground for removing the Defendant *C. Adams* from the trusteeship; and that the Plaintiff had, in fact, been paid his annuities in full, and was not entitled to an account. He was also of opinion that, even if the Plaintiff was entitled to have the property kept at its full value, the alleged acts of waste were of such a trumpery character that they need not be seriously considered. His Lordship then proceeded):—

I come now to the counter-claim, which asks for a declaration that the Plaintiff has forfeited his annuities by bringing this action. To answer the question raised by the counter-claim we must look at the words of the clause providing for the cesser of the annuities. [His Lordship read the clause set out above.] There are two classes of contingencies aimed at here: one is the interference with the management of the testator's real or personal estate; the other is his alienating his annuities. It is not suggested that he has done anything to alienate his annuities, nor is it suggested that he has interfered with the management of the personal estate. Therefore, the only question is whether the bringing of this action is an attempt to interfere with the management of the real estate. It is to be observed that the language of the proviso is very strong: "If he should in any way intermeddle with or interfere in, or attempt to intermeddle with or interfere in, the management," &c. Now one of the ways in which a person may attempt to interfere with the management

(1) 2 Vern. 80. (2) 1 P. Wms. 136.

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of real estate is by bringing an action asking for a receiver of the rents and profits, and for an injunction to restrain the trustees from occupying the trust estate. If the action had really been brought by the Plaintiff *bonâ fide* in defence of his annuity, I should have been prepared to hold that there was no attempt to intermeddle or interfere within the meaning of the proviso. But I am also prepared to hold, that where, as in this case, there is no probable cause of action, where all the points set up by the Plaintiff are trivial and the property is really in good condition, then there is an attempt to intermeddle and interfere with the management of the real estate contemplated by the proviso. Consequently, I declare that from the date of the commencement of this action the Plaintiff's annuities have ceased, and I dismiss the action.

Solicitors for the Defendants: *H. W. Reeves*, agent for *T. C. & G. F. Kellock, Totnes; Torr, Janeways, & Co.*, agents for *Eastley, Jarman, & Eastley, Paignton.*

M. W.

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DE FRANCESCO *v.* BARNUM.

[1889 D. 1890.]

Infant—Apprenticeship Deed—Validity—Unreasonable Provisions.

By an apprenticeship deed between an infant, her parent, and the Plaintiff, the infant was bound apprentice to the Plaintiff for seven years, to be taught stage dancing, upon certain terms, by one of which the infant contracted that she would not accept any professional engagement or contract matrimony during the said term without the consent of her master. The deed also contained mutual covenants by the master and the parent that the master would properly instruct the infant, and make certain payments to her for all dancing engagements in this country and in foreign or colonial countries; in return for which the infant's services were to be entirely at the disposal of the master. But there was no stipulation that the master should provide engagements for the infant or maintain her while unemployed. There was also a provision that the master might put an end to the apprenticeship if the infant should be found after fair trial unfit for the work of stage dancing, or should break any of the engagements of the deed, or in any way misconduct herself. The infant having made a professional engagement with the Defendant *B.*, the Plaintiff brought an

action against *B.*, the infant, and her parent, to enforce the provisions of the deed and for damages for breach of it:—

Held, that the provisions of the deed were unreasonable, and could not be enforced against the infant or her parent; and consequently that no action would lie against *B.* for enticing her away from the Plaintiff's employment.

THIS was an action brought by the Plaintiff, *George Giuseppe de Francesco*, a teacher of stage dancing, against *Phineas T. Barnum*, *S. A. de Parravicini*, *Elizabeth Parnell*, widow, and *Ada Parnell* and *Helen Maude Parnell*, infants, alleging that the two infant Defendants had been bound apprentices to the Plaintiff to learn the art of stage dancing for a period which had not elapsed, and that they had been enticed away from his service by the Defendants *Barnum* and *Parravicini*, and claiming all sums earned by the infant Defendants while in the service of *P. T. Barnum*; and an injunction to restrain the infant Defendants from performing in the service of the Defendant *Barnum*, and for damages against all the Defendants, except the infants.

By an indenture of apprenticeship, dated the 6th of December, 1886, and made between the Defendant *Helen Maude Parnell*, an infant of the age of fourteen years, of the first part, *Elizabeth Parnell*, the mother of the infant, of the second part, and the Plaintiff of the third part, it was witnessed as follows: "That in pursuance of the said agreement in this behalf the said apprentice, by and with the consent of the parent, doth put herself apprentice to the said *Giuseppe Venuto de Francesco* to learn his art, and with him (after the manner of an apprentice) to serve from the 6th day of December, 1886, until the full end and term of seven years from thence next following, and to be fully complete and ended, during which term the said apprentice her said master faithfully shall serve, his secrets keep, his lawful commands everywhere obey. She shall do no damage to her said master, nor see it to be done by others, but that she to the utmost of her power shall let or forthwith give warning to her said master of the same. She shall not waste the goods of her said master, nor lend them unlawfully to any. She shall not contract matrimony within the said term. She shall neither contract professional engagements, nor accept such unless with the full written

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permission of her said master. She shall not absent herself from her said master's service unlawfully; but in all things as a faithful apprentice she shall behave herself toward her said master and all his during the said term. And the said *Giuseppe de Francesco*, in consideration of the faithful services of the said apprentice in the art of choreography, which he useth, by the best means that he can, shall teach and instruct, or cause to be taught and instructed, his said apprentice during the said term, but subject in all respects to the stipulations hereinafter mentioned. And this indenture also witnesseth, that in pursuance of the said agreement in this behalf, and in consideration of the premises, the parent and the said *Giuseppe Venuto de Francesco* hereby mutually covenant and agree with each other as follows, that is to say:—

"1. That the said *Giuseppe Venuto de Francesco*, in conjunction with qualified assistants, shall instruct the said apprentice in the higher branches of the choreographic art for the term of seven years, to be computed from the date of these presents.

"2. That the said *Giuseppe Venuto de Francesco* shall pay to the said apprentice the following remuneration for all or any choreographic engagements of the said apprentice during the said term, viz.: in *London* and suburbs, for the first three years, 9*d.* per night, and 6*d.* for each *matinée*; and for the remainder of the said term, 1*s.* per night, and 6*d.* for each *matinée*. The said *Giuseppe Venuto de Francesco* shall have the right to engage the said apprentice for performances in *America* or in any colonial and foreign state, and shall pay to the apprentice during the continuance of such engagement the sum of 5*s.* per week, and also provide the said apprentice with board and lodging during such last-mentioned engagement.

"3. In the event of there not being sufficient dancing the apprentice may be required for utility business, and shall be paid for such service at the rate of 6*d.* per night, or for such *matinée*.

"4. The services of the said apprentice shall be entirely at the disposal of the said *Giuseppe Venuto de Francesco*; and the said apprentice shall not during the said term of seven years enter into any professional engagements without the permission in writing of the said *Giuseppe Venuto de Francesco*.

"5. The said apprentice shall take and receive lessons daily (of one hour's duration), except Saturdays and Sundays, and except in case of ill-health, during performances, rehearsals, public holidays, or when otherwise unavoidably prevented.

"6. The said apprentice shall abide by and conform to the rules, orders, and regulations of the theatre where the said apprentice shall be engaged.

"7. The parents and apprentice shall conform to all the requirements of the *Education Acts*; and the parents shall furnish the said *Giuseppe Venuto de Francesco* on the first day of each month with a governess' certificate that the said apprentice's scholastic obligations are strictly adhered to.

"8. In case the said *Giuseppe Venuto de Francesco* shall at any time during the said term be of opinion (after a fair trial) that the said apprentice is unfit from any cause whatever (either physical or otherwise) to pursue the avocation of stage dancing, the said *Giuseppe Venuto de Francesco* may put an end to these presents and every matter and thing herein contained by giving to the parents and the said apprentice notice in writing to that effect.

"9. Should the parents fail in the fulfilment of any of the terms of these presents on his or her part herein contained, or if the said apprentice shall fail to comply with the rules and regulations which may be necessary for the fulfilment of any engagement, or accept any engagement without having previously obtained the written consent of the said *Giuseppe Venuto de Francesco*, or practise the art of stage dancing under the direction of any person or persons other than the said *Giuseppe Venuto de Francesco*, or his assistants, or withhold her talents and best endeavours, or by direct or indirect insubordination, or fail to attend practice or rehearsal regularly and punctually, or decline to accept any engagement or stage business of which the said *Giuseppe Venuto de Francesco* may approve, or not give proper attention to her duties at the theatre or elsewhere; and above all, should the conduct of the apprentice be liable to blame in or out of school, the said *Giuseppe Venuto de Francesco* may by notice in writing, addressed in a registered letter to the parents, or the survivor of them, put an end to these

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presents; and the parents shall thereupon pay as and for liquidated damages to the said *Giuseppe Venuto de Francesco* the sum of £50."

The other deed, by which the Defendant *Ada Parnell*, then of the age of twelve years, was bound apprentice to the Plaintiff, was of the same date and in precisely similar terms.

In August, 1889, the infant Defendants entered into agreements with the Defendant *Parravicini*, as the agent of the Defendant *Barnum*, to perform as stage dancers at his show called *Olympia* at a salary of 21*s.* a week each.

On the 7th of November, 1889, the Plaintiff ascertained that the infant Defendants had signed agreements to perform for the Defendant *Barnum*, and he thereupon commenced the present action.

As soon as the action was commenced the Plaintiff moved for an injunction in terms of the writ. The motion was heard on the 22nd of November, 1889, by Mr. Justice *Chitty*, who refused the application with costs on the ground that the negative clause of an apprenticeship deed could not be enforced either at law or in equity against the infant apprentice (1).

The Defendants *Barnum* and *Parravicini* in their defence denied that they had at the time when they engaged the infant Defendants, any knowledge that they were apprenticed to the Plaintiff, or that they had any intention to injure the Plaintiff in making the engagement. All the Defendants resisted the Plaintiff's claim on the ground that the stipulations in the deed were unreasonable and oppressive and against public policy, and that the deeds were void.

The action now came on for trial before Lord Justice *Fry*, sitting as an additional judge of the Chancery Division.

Both parties went into evidence. It was proved that the Plaintiff's establishment was well-conducted, and that he exercised proper care over his female apprentices. There was no satisfactory evidence that either of the Defendants *Barnum* and *Parravicini* had at the time of making the engagement with the infant Defendants any knowledge that they were the Plaintiff's apprentices.

(1) 43 Ch. D. 165.

Neville, Q.C., and *Kalisch*, for the Plaintiff:—

We admit ourselves bound by the decision of Mr. Justice *Chitty* in this case (1), that the Plaintiff has no right which he can enforce by injunction; but we contend that *Barnum's* inducing the infants to break their engagement is an actionable wrong, for which we are entitled to recover damages. That *Barnum* did not at first know of the apprenticeship is, we submit, immaterial, for he continued to employ the infants after he knew of it. This was held in *Blake* v. *Lanyon* (2), which decided that such an action lies in the case of a servant. It also lies in the case of an employment of this nature: *Lumley* v. *Gye* (3); *Bowen* v. *Hall* (4). [*Burnard* v. *Haggis* (5), was also referred to.]

Warmington, Q.C., and *Lemon*, for the Defendant *Barnum*:—

Meriton v. *Hornsby* (6), *Hill* v. *Allen* (7), and all the other cases where the right of the master to the profits made by an apprentice has been enforced, have been cases where there was no doubt as to the validity of the contract of apprenticeship. Here we contend the contract is one which cannot be enforced, as it is not beneficial to the infants.

[FRY, L.J.:—If the Plaintiff is a very distinguished teacher, might it not be a very advantageous bargain for the pupils?]

There were not such advantages as to make the bargain good as being beneficial to the infants. There is no contract for maintenance, no engagement to find employment for the infants, and no contract for wages except while they are employed. The statutes 5 Eliz. c. 4; 54 Geo. 3, c. 96; 38 & 39 Vict. c. 86, s. 17; 38 & 39 Vict. c. 90, do not apply to an employment of this description. The case then is governed by common law, and such a one-sided agreement as this cannot be supported: *Reg.* v. *Lord* (8); *Meakin* v. *Morris* (9), in which latter case doubt

(1) 43 Ch. D. 165.
(2) 6 T. R. 221.
(3) 2 E. & B. 216.
(4) 6 Q. B. D. 333.
(5) 14 C. B. (N.S.) 45.
(6) 1 Ves. Sen. 48.
(7) Ibid. 83.
(8) 12 Q. B. 757.
(9) 12 Q. B. D. 352.

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is thrown upon *Leslie* v. *Fitzpatrick* (1). [*Webb* v. *England* (2), and *Cooper* v. *Cooper* (3), were also referred to.]

T. L. Wilkinson, for the Defendant *Parravicini* :—

I will only add, that clause 8 of the agreement gives the Plaintiff such an arbitrary and unreasonable power that the agreement cannot stand. *Parravicini* did not know of the agreement with the Plaintiff when he as agent for *Barnum* negotiated for the services of the infants, and after the agreement he made had been entered into he was *functus officio*. There is, therefore, no possible right of action against him.

W. H. Stevenson, for the infant Defendants :—

The deeds are not for the benefit of the infants, and are therefore wholly void. The only ground on which an apprenticeship deed is binding on an infant is that it is for his benefit; but if the deed contains such provisions that it is not for the infant's benefit, but for his detriment, the reason for upholding the deed is gone, and it is void both against the infant and against all other parties. No doubt these deeds contain provisions for the instruction of the infants in dancing; but the question is whether, taken on the whole, the contract was prejudicial to them.

When the clauses in the deeds are looked at they are most unfair to the infants: they were to be absolutely in his power; they could make no engagement without his permission; and, on the other hand, he was not bound on his part to find them engagements, or to maintain them in any way when unemployed; so that he had the power to deprive them altogether of their livelihood. And even during the engagements which he might provide for them, the remuneration was unreasonably small. The Plaintiff also had the power at any time of putting an end to the engagement if dissatisfied with the infants for any reason, while they had no corresponding power on their part. The whole bargain was one-sided and oppressive, and cannot stand.

(1) 3 Q. B. D. 229. (2) 29 Beav. 44.
(3) 13 App. Cas. 88.

Sinclair-Cox, for Mrs. *Parnell* :—

The provisions in the deeds are not only oppressive to the infants, but are against public policy. They are a restraint on trade ; they are a restraint on matrimony ; they are in derogation of the rights of the parent ; and they give the Plaintiff power to take the infants out of the jurisdiction.

Kalisch, in reply.

FRY, L.J. :—

This is an action brought by Signor *De Francesco*, who is the proprietor and manager of a large school for the teaching of ballet-dancers, against several Defendants. Those Defendants are, in the first place, Mr. *Barnum*, who, at the time this action was brought, was described as proprietor of a certain show, known as *Barnum's* show, at *Olympia*. The next Defendant is a Signor *Parravicini*, who is a theatrical agent in *London*, and who was employed by Mr. *Barnum* to engage ballet-dancers for him. The next Defendant is Mrs. *Parnell*, who is the mother of the two infants, the ballet-girls ; and lastly come the two infant Defendants, who have been apprenticed to Signor *De Francesco* ; those are the parties to the action.

In the first place, with regard to the two infants, the case appears to me to have been determined by Mr. Justice *Chitty* when it came before him on the motion. I say that for this reason, that he pointed out in his judgment, that so far back as the reign of *Charles* I. it had been determined that an infant could not be sued at law upon an apprenticeship indenture ; that there are other remedies which the master may have recourse to, but that he cannot sue the apprentice at law, and, furthermore, that there is no case in which the apprentice has been sued in equity ; and he came to the conclusion that that authority was binding on him, unless after the various statutes, the statute of *Elizabeth* and the subsequent statutes, with regard to apprenticeship were all examined, there were some explanation given of that authority. Mr. *Neville* very candidly stated, that after examining the statutes, he was unable to offer any explanation of that authority, and, therefore, he very wisely and rightly

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suggested that I should probably not want to reconsider that branch of the argument, but consider myself bound by what Mr. Justice *Chitty* had done in this case. Therefore, the case has not been elaborately argued on that point; and I only, on this part of the case, follow Mr. Justice *Chitty*, at the same time saying, that nothing that has been said has created in my mind any reasonable belief that the decision of Mr. Justice *Chitty* was not perfectly in accordance with the law. For my own part, I should be very unwilling to extend decisions the effect of which is to compel persons who are not desirous of maintaining continuous personal relations with one another to continue those personal relations. I have a strong impression and a strong feeling that it is not in the interest of mankind that the rule of specific performance should be extended to such cases. I think the Courts are bound to be jealous, lest they should turn contracts of service into contracts of slavery; and therefore, speaking for myself, I should lean against the extension of the doctrine of specific performance and injunction in such a manner. So much for the case against the infants.

With regard to the first Defendant, Mr. *Barnum*, the case stands in this way. It is alleged that he has enticed away the apprentices of Signor *De Francesco*; that he has done so with the knowledge of their engagement with Signor *De Francesco*, and consequently that what he did was in law malicious; and that he would be liable in damages for the malicious act. To that his defence is this, that the indentures of apprenticeship which were entered into between the infants and Signor *De Francesco* were not valid and binding in law, and that that being so the whole structure of the case against him fails; and he further argued that he had not done anything which was malicious, and that there was no employment in fact of which they were deprived, or from which they were enticed away. He has further urged that there is no evidence of damage before me to justify my pronouncing a judgment against him for damages.

The most important question in this case is the first of those propositions which has been urged at the Bar on Mr. *Barnum's* behalf. Is there or is there not in this case a valid contract between the infants and Signor *De Francesco*? Now, from a

very early date it has been held that one exception as to the incapacity of an infant to bind himself relates to a contract for his good teaching or instruction whereby he may profit himself afterwards, to use Lord *Coke's* language. There is another exception, which is based on the desirableness of infants employing themselves in labour; therefore, where you get a contract for labour and you have a remuneration of wages, that contract, I think, must be taken to be, *primâ facie*, binding upon an infant. At any rate, it is plain that the contract by which an infant binds himself to learn an art or trade to his own future profit is, *primâ facie*, valid and binding. But no doubt the law has grafted on that general principle certain well-known and defined exceptions. It has been held from the time of Lord *Coke*, that an infant cannot bind himself to be liable to a penalty; that the contract to impose a penalty on an infant is void. Again, it has been held that a contract by which an infant renders his vested interest subject to forfeiture is void against the infant; and again, I think it may be taken that, wherever you find extraordinary or unusual stipulations contained in a contract, either of apprenticeship or of service, there the Court at least must be on the watch lest the infant should be held to be bound by a contract which is not reasonable and which is not good in law and which is not maintainable.

Now I approach this subject with the observation that it appears to me that the question is this, Is the contract for the benefit of the infant? Not, Is any one particular stipulation for the benefit of the infant? Because it is obvious that the contract of apprenticeship or the contract of labour must, like any other contract, contain some stipulations for the benefit of the one contracting party, and some for the benefit of the other. It is not because you can lay your hand on a particular stipulation which you may say is against the infant's benefit, that therefore the whole contract is not for the benefit of the infant. The Court must look at the whole contract, having regard to the circumstances of the case, and determine, subject to any principles of law which may be ascertained by the cases, whether the contract is or is not beneficial. That appears to me to be in substance a question of fact.

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Now in the present case I must bear in mind that the two girls who were apprenticed in the year 1886 were at that time not ignorant of the art of dancing. It appears they had learnt something of it from their mother, who herself had been connected with the theatre, and also from friends who were familiar with the art of dancing. By this indenture, which I have already mentioned, dated December, 1886, the Defendant, *Helen Maude Parnell*, with the consent of her parent, put herself apprentice to Signor *De Francesco*, to learn from the 6th day of December, 1886, until the full end of the term of seven years from thence next following, during which term the apprentice should her master faithfully serve, and so forth, with the usual stipulations with regard to faithful service. There is the further stipulation that she shall not contract matrimony within the said term, and further that she shall not accept professional engagements unless with the full written permission of her master. Now, so far, the contract, with the exception of the stipulation about matrimony, seems to be of a usual description. But then we come to the clauses by which Signor *De Francesco* undertakes his duties towards the child. In the first place, he agrees that he will, with qualified assistants, instruct the apprentice in what are described as "the higher branches of the choreographic art," which I understand to be dancing, "for the term of seven years." Then he agrees to pay the apprentice "the following remuneration for all or any choreographic engagements of the said apprentice during the said term, namely, in London and suburbs, for the first three years, 9*d.* per night, and 6*d.* for each *matinée*; and for the remainder of the said term, 1*s.* per night, and 6*d.* for each *matinée*." Then, further, he shall have the right to engage the apprentice to performances in *America* or any foreign or colonial state, and shall pay to the apprentice, during the maintenance of such engagement abroad, the sum of 5*s.* a week, and provide the apprentice with board and lodging during such last-mentioned engagement.

It is obvious that that is a very unusual stipulation. There is no provision for remuneration of any sort or kind, except during the engagement. There are no wages to be paid to the girls except during the engagement. The matter, therefore,

rests with Signor *De Francesco* as to how far those children shall take any wages at all. Nor can it be entirely put out of consideration that he has a right to send these apprentices for performances to any foreign state or foreign country, a power which, if exercised, would remove the infants, or probably would remove the infants from maternal care. Now perhaps it is right at this point that I should say that, so far as the evidence goes, I am satisfied that the establishment of Signor *De Francesco* is carried on in a thoroughly careful and respectable manner. It appears that whenever the girls go anywhere out of *London* they are placed under the care of matrons, whose duty it is to look after them, and that a similar care has been extended to them when there has been a performance at the *Crystal Palace*, and they had to take the journey between *London* and *Sydenham*. The mother, who was in the witness-box, says explicitly, so far as regards the care whilst the children had been under Signor *De Francesco's* management, she has no complaint to make whatever. I say that by way of parenthesis. At the same time it is obvious that the clause I have read places a very large power indeed in the hands of Signor *De Francesco*.

The next provision is, that if there is not sufficient dancing the apprentice may be required to do utility business and receive certain remuneration. That would not seem unreasonable. Then it is provided: "The services of the apprentice shall be entirely at the disposal of Signor *De Francesco*, and the said apprentice shall not during the said term of seven years enter into any professional engagements without the permission in writing of the said Signor *De Francesco*." Be it observed there is no corresponding obligation on the part of Signor *De Francesco*. He requires the infant to enter into no engagements without his permission, but does not in any corresponding way bind himself to any extent to provide engagements or employment for the infant.

Then comes the provision with regard to the apprentices receiving lessons, and a provision as to the rules and regulations of the theatre. They all seem reasonable; and then there is a provision which is praiseworthy, requiring the infant to conform to the *Education Act*, and then comes the 8th clause: "In case

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the said *Giuseppe de Francesco* shall at any time during the said term be of opinion (after a fair trial) that the said apprentice is unfit from any cause whatever (either physical or otherwise) to pursue the avocation of stage dancing, the said Signor *De Francesco* may put an end to these presents and every matter and thing herein contained by giving to the parents and the said apprentice notice in writing to that effect." Now, be it observed that that clause is provided to operate throughout the whole seven years. It might be put in force at any time, subject only to this, that it must be after a fair trial. But what is a fair trial? How long after the fair trial this notice may be given is not stipulated for in any manner whatsoever. We have therefore, to put it shortly, the contract under which the infant is placed, I might almost say absolutely, at the disposal of the teacher. The child may be required to undertake any engagements at any theatre in *England*, or any theatre in the *United Kingdom*, or anywhere else in the world. The child is to receive no remuneration, no maintenance except when employed; there is no correlative obligation on Signor *De Francesco* to find employment for the child; there is power in him to put an end to a child's chances of success at any time after trial.

Those are stipulations of an extraordinary and an unusual character, which throw, or appear to throw, an inordinate power into the hands of the master without any correlative obligation on the part of the master. I cannot, therefore, say that on the face of this instrument it appears to be one which the Court ought to hold to be for the benefit of the infant.

Now, I will suppose myself sitting in Chambers administering the jurisdiction in this division of the Court over infants; and I ask myself whether I should approve of such a contract as that as being for the benefit of an infant ward of Court—assuming of course, in so doing, that the infant ward of Court was one whom it was desirable to apprentice to the art of a ballet-dancer. I cannot say that I should hold anything of the kind. It may be that evidence could be tendered which would shew me that no other form of contract is available, that the same contract prevails in every school, and that no person can hope to enter the profession of a ballet-dancer except by apprenticeship in these terms.

That may be so. But no evidence of the sort has been tendered before me. I have undoubtedly this in favour of upholding it, that the school of the Plaintiff is said by Mrs. *Parnell* to be a very excellent school, and, for anything I know, it may be the best in *London*, and, I have already said, Signor *De Francesco* is a person who is well able to, and does, protect the interest of the girls who are under his care. At the same time, this contract seems to me to place in his hands an inordinate power, which, except under the pressure of some evidence which has not been given, I cannot help being of opinion is not for the infants' benefit.

I hold, therefore, this instrument is one by which the infants are not bound; and consequently Mr. *Barnum*, having only enticed them away from an employment or contract of a nature which is not binding upon them, no action can be maintained against Mr. *Barnum*.

[His Lordship further stated his conclusion that it had not been proved that *Parravicini* did anything whatever with any knowledge of the engagement between the Plaintiff and the girls, and dismissed the action against all Defendants with costs to be paid by the Plaintiff.]

Solicitors for Plaintiff: *Brandon & Nicholson.*
Solicitors for Defendants: *H. Levy; Clinton & Co.*

M. W.

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Aug. 7, 8.

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[1889 B. 1331.]

Breach of Trust—Following Assets—Statute of Limitations—Trustee Act, 1888 (51 & 52 *Vict.* c. 59), *s.* 8—*Parties—Trustee representing Beneficiaries—Rules of Supreme Court*, 1883, *Order* XVI., *r.* 8.

A newly appointed trustee of a will brought an action against an old trustee and the representatives of two deceased trustees to compel them to make good losses arising from investments negligently made on insufficient security more than six years before the action. *R. G.*, the executor of *D. G.*, one of the deceased trustees, had after *D. G.'s* death issued the proper statutory advertisements and administered the estate, retaining in hand two legacies which had been bequeathed to him on trust. By leave of the Court at the trial the statement of claim was amended to make it a claim against *R. G.* as trustee of the legacies and to follow the legacies into his hands, *R. G.* to be at liberty to claim the benefit of any statutes of limitation :—

Held, that having regard to Order XVI. r. 8, the *cestuis que trust* of the legacies were not necessary parties to the action.

Held, that sect. 8, sub-sect. 1 (*a*) of the *Trustee Act*, 1888 (51 & 52 Vict. c. 59), did not apply to the case, but that sect. 8, sub-sect. 1 (*b*) did apply; that under it *R. G.* was entitled to plead the lapse of time as he might have done in an action of debt, and that, as the cause of action had accrued more than six years before the action, *R. G.* had a good defence.

WILLIAM BOWDEN died in 1864 leaving a will dated the 6th of May, 1856, by which he devised and bequeathed his real and personal estate to trustees upon trust for conversion, and to hold the proceeds upon trust for such of his eight children therein named as should survive him and attain the age of twenty-one years in equal shares. As to the share of each daughter, he directed his trustees to invest it in the funds or on Government or real securities, and hold the investments upon trust for her for her life, and after her death for her children as therein mentioned.

All the eight children, six of whom were daughters, survived the testator and attained twenty-one.

By decree of the Court of Chancery, dated the 19th of January, 1869, *Baxter*, *Daniel Greatorex*, and *Cooper* were appointed to be

the trustees of the will, and the trust estate was duly vested in them.

In 1874 the trustees advanced £4000 out of the trust estate to one *Brown* on a mortgage in fee of a piece of land and buildings at *Birkenhead*. They also in the same year advanced a considerable sum to another person upon another mortgage, on which at the time of this action £2600 remained due.

Baxter died in May, 1876.

In December, 1878, additional buildings having been erected on the *Birkenhead* property, *D. Greatorex* and *Cooper* advanced to *Brown* £800 on a further charge.

In April, 1882, the Plaintiff was appointed a trustee of the will in the place of *Baxter*.

In January, 1883, *D. Greatorex* died, leaving a will by which he gave his real and residuary personal estate to *Richard Greatorex* and *Worthington* upon trust to appropriate two legacies of £6000 and £5000 to be held by them upon certain trusts, and to stand possessed of the residue on the trusts therein mentioned. He appointed *Richard Greatorex*, *Worthington*, *A. D. Greatorex*, and *F. Greatorex* executors. In April, 1883, *R. Greatorex* proved the will, power being reserved to the other three to come in and prove. *Worthington* disclaimed, and *A. D. Greatorex* and *F. Greatorex* did not prove or act. *Richard Greatorex* alone issued the statutory advertisements and administered the estate of *D. Greatorex*, which was insufficient to meet in full the legacies of £6000 and £5000, the sum applicable to them being only £8000. This sum he invested in his own name on mortgage.

The *Birkenhead* security was unquestionably insufficient, and it was probable that a loss would occur on the other mortgage. The Plaintiff, therefore, in 1889 brought this action against *Cooper*, the executors of *Baxter*, and *Richard Greatorex*. By his statement of claim he alleged the facts of which a summary is given above, and also that the advances on mortgage were improperly made without proper valuations and on insufficient security, and that the £8000 invested by *Richard Greatorex* "is now held by him as executor and trustee of the will of the said *D. Greatorex*, and is applicable to answer the claim raised in this action." He claimed a declaration that *Cooper* was liable

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personally, and that *Baxter's* executors were liable as executors out of his estate, and that *R. Greatorex* "is liable as executor of the said *D. Greatorex*, deceased, out of his estate," to make good to the estate of *Bowden* the £4000 and the £2600 with interest, and a decree for the Defendants to replace the £4000 and £2600 accordingly; a declaration that *Cooper* was liable personally and that *R. Greatorex* "is liable as executor of the said *D. Greatorex*, deceased, out of his estate," to make good the £1800 with interest, and a decree accordingly; and that so far as necessary the real and personal estates of *Baxter* and *D. Greatorex* might be administered under the direction of the Court.

R. Greatorex by his defence alleged that he had duly advertised for creditors under 22 & 23 Vict. c. 35, and had not administered the estate till after the period for sending in claims had expired. He, therefore, denied that the £8000 was in his hands as executor, or that he was in any way liable personally or as executor to make good to *Bowden's* estate any of the amounts for which the estate of *D. Greatorex* was alleged to be liable.

The action was tried by *Fry*, L.J., as an additional Judge of the Chancery Division.

At the trial evidence was adduced which satisfied the Court that the investments were made without taking due precautions to ascertain the value of the securities, and were therefore breaches of trust for which the trustees who made them were personally liable.

Warmington, Q.C., and *Method*, for the Plaintiff, asked for judgment according to the claim.

Neville, Q.C., and *T. L. Higgins*, for the executors of *Baxter*, asked that an immediate order for replacing the funds should not be made, but that the securities might be realized and the deficiency ascertained, and that an order should then be made for making good the deficiency.

Clare, for the executors of *Cooper*, who had died since the commencement of the action.

S. Hall, Q.C., and *E. S. Ford*, for *Richard Greatorex*:—

We submit that in this action *R. Greatorex* is sued as executor only, not as trustee; and that the action is not framed on the footing of following the assets of *D. Greatorex*. If so, the action must be dismissed as against *R. Greatorex*; for, having duly issued the statutory advertisements, he is no longer liable as executor: *Clegg* v. *Rowland* (1). If, on the other hand, it is on the construction of the statement of claim to be treated as an action to follow the assets of *D. Greatorex*, it is defective for want of parties, for the *cestuis que trust* of the legacies ought to be here, as was laid down by Vice-Chancellor *Malins* in the case referred to.

FRY, L.J., held that if *R. Greatorex* was sued as trustee on the principle of following assets into the hands of a legatee, then, having regard to Order XVI. rule 8, which was substantially the same as rule of the statute 15 & 16 Vict. c. 86, s. 42, *cestuis que trust* were not necessary parties; and that the *dicta* of Vice-Chancellor *Malins* to the contrary, in *Clegg* v. *Rowland*, did not give an accurate representation of the practice. His Lordship, however, considered that it was not clear on the statement of claim whether relief was asked against *R. Greatorex* as trustee, and put the Plaintiff to his election whether he would have the case heard out on the present pleadings, or would amend the statement of claim on the terms that the action should be treated as commenced on that day, and that the defence of *R. Greatorex* should be treated as amended by claiming the benefit of every *Statute of Limitations* on which he could rely.

The Plaintiff elected to amend on these terms, and the argument was continued on the footing of the amendment having been made.

S. Hall, Q.C., and *E. S. Ford*, for *R. Greatorex*:—

We ask to have the action dismissed, as barred by the *Statute of Limitations*. By the *Trustee Act*, 1888 (51 & 52 Vict. c. 59), s. 8, sub-s. 1 (*a*), it is enacted that in a proceeding against a trustee, except where the claim is founded on fraud or fraudulent breach

(1) Law Rep. 3 Eq. 368.

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of trust, or is to recover trust property or the proceeds thereof still retained by the trustee or previously received by the trustee and converted to his use, the trustee shall have the same benefit of any statute of limitations as if he had not been a trustee. The intention of the Legislature clearly was that in all actions against a trustee founded on negligence, and not on fraud, he should have the same defences as if he was not a trustee. This provision applies to the case, since the action is to be treated as commenced to-day.

[FRY, L.J.:—How can sect. 8, sub-sect. 1 (*a*) apply? An action for breach of trust cannot be brought against any one who is not a trustee. Of what statute of limitations do you claim the benefit under that clause?]

Of statute 21 Jac. 1, c. 16, s. 3. Such a proceeding as the present falls within the analogy of "actions of account and upon the case." It is an equitable action on the case for negligence. A trustee was intended by the Act of 1888 to be put on the same footing as a solicitor guilty of negligence, in whose favour the *Statute of Limitations* runs from the time of the negligence.

Method, in reply:—

An action on the case is an action to recover consequential damages, and is entirely different from an action to compel a trustee to replace a trust fund. The sect. 8, sub-sect. 1 (*a*) cannot apply, for the action is one which could not be brought against any one not a trustee, and there is no statute of limitations which applies to it. The Plaintiff, therefore, is entitled against *R. Greatorex* to the extent of the legacies in his hands.

FRY, L.J.:—

On the main point in this case, whether the investments made by the trustees were breaches of trust, there is no serious controversy, it being clear on the evidence that the trustees invested on insufficient securities, without taking due precautions to ascertain their value. I propose to give a judgment ordering that the securities shall be realized and the deficiency ascer-

tained, and directing an inquiry how the deficiency is to be made up out of the different estates liable. I will take time to consider the question raised by the executor of *Greatorex*.

1890. Aug. 8. FRY, L.J.:—

This is an action brought by a trustee who has been recently appointed, against an old trustee and the representatives of two deceased trustees, for breaches of trust. One of the Defendants, *Richard Greatorex*, is the executor of *Daniel Greatorex*, who was one of the trustees. The estate of *Daniel Greatorex* was administered several years ago, after statutory advertisements had been issued in the usual way. An objection was taken that, if any relief was to be sought against the funds remaining in the hands of the Defendant, *Richard Greatorex*, which are trust legacies, of which he is the trustee, the persons beneficially interested in those legacies were necessary parties to an action to follow the assets. I yesterday determined that they were not; but then the question arose whether, in the present state of the pleadings, this is an action to follow assets, and whether it is not, as regards Mr. *Greatorex*, an action against him merely in his character of executor. On the pleadings as they stand, some difficulty arises in that respect, because, in the 23rd paragraph of the amended statement of claim, it is stated that the estate of *Daniel Greatorex* was not sufficient to provide for the payment in full of the two trust legacies of £6000 and £5000, but that a sum of £8000 had been appropriated to them, and had been invested on mortgage in the name of the Defendant *Richard Greatorex*, "and is now held by him as executor and trustee of the will of *Daniel Greatorex*, and is applicable to answer the claim raised in this action." That statement is obviously somewhat embarrassing, because the £8000 is said to be held by him in two characters, those of executor and trustee. Then the Plaintiff's claim goes on to ask to have it declared that the Defendant *Richard Greatorex* "is liable, as executor of *Daniel Greatorex*, out of his estate," to make good the breaches of trust. Nor does it stop there; for it prays that, so far as necessary, the real and personal estate of *Daniel Greatorex* may be administered under the direction of the Court. I ought, further, to add that

FRY, L.J. 1890 *In re* BOWDEN. ANDREW *v.* COOPER.

the writ, as originally drawn, was brought against *Richard Greatorex* as executor, and was never amended.

In that state of circumstances, what I did was this: I offered to the Plaintiff's counsel either to go on with the action as it then stood, in which case I should determine the effect of the pleadings or to amend; but if the amendment was made with a view of stating a case for following assets, then that must be subject to two conditions—one, that the action must be treated as if it was instituted yesterday; and the second, that not only must the Plaintiff's pleadings be amended, but the Defendant's pleadings treated as amended by allowing the Defendant to set up every statute of limitations on which he could rely. After consultation between the learned counsel who represented the Plaintiff, they elected to amend subject to those conditions; therefore, I treat the pleadings as so amended.

Then arises this question, whether or no, under the circumstances, the *Trustee Act* of 1888 furnishes a defence. The last of the breaches of trust which are complained of took place as long ago as the year 1878, considerably more than six years before the action was begun. The 8th section of the *Trustee Act* of 1888 enacts that, "In any action or other proceeding against a trustee or any person claiming through him, except where the claim is founded upon any fraud or fraudulent breach of trust to which the trustee was party or privy, or is to recover trust property, or the proceeds thereof still retained by the trustee, or previously received by the trustee and converted to his use, the following provisions shall apply." I think it is plain that neither of the excepted cases includes the present action, so as to take it out of the operation of the section. Sub-sect. 1 (*a*), which is the first provision, is this: "All rights and privileges conferred by any statute of limitations shall be enjoyed in the like manner and to the like extent as they would have been enjoyed in such action or other proceeding if the trustee or person claiming through him had not been a trustee or person claiming through him." That was the sub-section relied on by the Defendant; but I do not think that it can apply in this case. In the first place, it is obvious that if a person had not been a trustee, he could not be sued for a breach of trust; and further, that there is no

right or privilege, that I am aware of, conferred by any statute of limitations in respect of a breach of trust. Therefore, I should have great difficulty in applying that sub-section to the present case. But the material sub-section to which the Defendant has not called my attention appears to me to be sub-sect. 1 (*b*): "If the action or other proceeding is brought to recover money or other property, and is one to which no existing statute of limitations applies"—I pause there to inquire whether the present action is within that description. It appears to me that it is. It is an action brought to recover money. It is an action to which no existing statute of limitations applies. In that event the provision is this: "The trustee or person claiming through him shall be entitled to the benefit of and be at liberty to plead the lapse of time as a bar to such action or other proceeding in the like manner and to the like extent as if the claim had been against him in an action of debt for money had and received." Pausing there, it appears to me that that gives the Defendant a good defence under this new clause. If this had been an action for debt, for money had and received, and the debt had arisen more than six years ago, and no acknowledgment had taken place in the meanwhile, the lapse of time would have furnished a defence. Then the clause goes on: "But so nevertheless that the statute shall run against a married woman entitled in possession for her separate use, whether with or without a restraint upon anticipation,"—that does not apply to this case—"but shall not begin to run against any beneficiary unless and until the interest of such beneficiary shall be an interest in possession." That is a restriction upon the clause; but it is only as against a beneficiary, and a beneficiary is only affected from the time of possession. That limitation does not apply to the present case, because in the present case the action is brought by one trustee against another, and therefore neither of the provisoes—the one relating to married women, the other to beneficiaries—applies to the case before me. It appears to me, therefore, that the section does furnish a defence, and, consequently, that as against the Defendant *Richard Greatorex*, the action must be dismissed with costs.

On reconsidering the matter, I think that, as the inquiry

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which I yesterday proposed to direct might raise difficult questions of law, the better course will be to direct a sale, and direct the Chief Clerk to certify the amount remaining due in respect of the breach of trust, and to reserve further consideration.

Solicitors for Plaintiff: *Rowcliffes, Rawle & Co.*, agents for *Claye & Sons, Manchester.*

Solicitors for *Cooper's* executors: *Wynne, Holme & Wynne*, agents for *Cooper & Son, Manchester.*

Solicitor for *Baxter's* executors: *H. P. Becher*, agent for *Hedgcock & Ducker, Manchester.*

Solicitors for *Greatorex*: *Chester & Co.*, agents for *Bullock & Worthington, Manchester.*

H. C. J.

In re HEMINGWAY.
JAMES *v.* DAWSON.

KAY, J.
1890.
Aug. 6.

[1890 H. 1799.]

Will—Construction—Annuity terminable on Expiration of Lease—Gift over on Death of A. without "leaving" Child.

The principle of construction whereby, in the case of a gift over on death without "leaving" children, the word "leaving" is construed "having," so as not to take away an interest previously vested, will not readily be applied where the subject-matter of gift is an annuity, which *ex vi termini* involves the notion of personal enjoyment.

A testator gave to his daughter *L.* an annuity during her life payable out of the rents of leasehold property held for an unexpired term of about sixty years, and after the death of *L.* directed that the annuity should be payable half-yearly to and amongst such of her children as being sons should attain twenty-one, or being daughters should attain that age or marry, and if there should be but one such child, should be payable and paid to such only child, and in the event of the death of *L.* "without leaving" any such child the testator gave the annuity which should fail by such death unto and among the survivors of the testator's children and grandchildren. The testator directed that the leaseholds should not be sold, but be retained by his trustees, and the rents applied in payment of this and other annuities. *L.* survived the testator, and had one child who attained twenty-one, but died in the lifetime of *L.*:—

Held, that the word "leaving" must be read in its literal sense, and that therefore the representative of the deceased child was not entitled to the annuity, but the gift over took effect.

ADJOURNED SUMMONS.

John Hemingway, who died on the 7th of July, 1872, by his will, dated the 18th of July, 1868, after making certain pecuniary and other bequests, gave to his wife for her life an annuity of £400 to be charged upon and payable out of the leasehold premises and residuary estate thereinafter mentioned, and to be paid half-yearly, or as near thereto as conveniently could be, and the testator gave the following annuities—to his daughter *Lucy* for her life the annual sum of £80; and to his daughter *Anna* for her life the annual sum of £100; to his granddaughter *Mary Ann Jones* for her life the annual sum of £25; to his grandson *William Jones* for his life the annual sum of £25; to his granddaughter *Lucy Jones* for her life the annual sum of £25; and to his

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grandson *John Jones* for his life the annual sum of £25; and in the event of the decease of any of the said four last-mentioned annuitants without leaving any child who being a son should attain the age of twenty-one years, or, being a daughter, should attain that age or marry, then he gave the annuity of the annuitant so dying unto and to be equally divided between the survivors of the said four annuitants for their several lives, or to the survivor for his or her life in like manner and as an addition to his or her annuity of £25; and the testator directed that after the decease of any such annuitant as aforesaid his or her annuity should be payable and paid half-yearly as aforesaid (during the subsistence of the lease of the premises at *Cardiff* thereinafter mentioned) to and amongst such of his or her children as being a son or sons should attain the age of twenty-one years, or being a daughter or daughters should attain that age or marry, in equal shares; and in the event of there being but one such child should be payable and paid to such only child; and in the event of the death of his said daughter *Lucy*, or of his said daughter *Anna*, or of all his said four last-named grandchildren, without leaving any such child as last aforesaid respectively, he gave the annuity or annuities which should fail by such death unto and among the survivors of his said daughters and his last-named grandchildren *pro ratâ* according to the amounts of the principal annuities thereby bequeathed to them respectively and as an addition thereto, the said four grandchildren to be considered for the purpose of that gift as being jointly entitled among them, and the survivors or survivor of them, to one principal annuity of £100; and the testator charged all his share and interest of and in certain leasehold premises situate at *Cardiff*, and which were held jointly by him and *Charles Pearson* and *Susan Hemingway*, with the payment of the said several annuities to his said two daughters *Lucy* and *Anna*, and four grandchildren and their respective issue as last aforesaid, in exclusion of all other his real and personal estate whatsoever. And the testator directed that his said share and interest of and in the leasehold premises should not be sold or disposed of, but should be retained by his trustees so long as the laws in relation to perpetuities would admit, and that the rents, issues, and profits

should be divided and paid in such annuities and sums and to such persons respectively as were thereinbefore particularly mentioned.

The leasehold premises at *Cardiff*, referred to in the will, were held for a term of years whereof about sixty years remained unexpired at the death of the testator.

The testator's daughter *Lucy* survived him, and died having had only one child who attained twenty-one, namely, a daughter who died in *Lucy's* lifetime.

This was a summons taken out by the persons entitled to take out representation to the child of *Lucy*, as Plaintiffs, against the surviving executor and trustee of the will and persons interested under the ultimate gift, as Defendants, for the determination, *inter alia*, of the question whether the child of *Lucy* took an absolute interest in the annuity of £80 or whether the same passed under the gift over to the survivors of the testator's daughters and grandchildren.

Theobald, for the Plaintiff:—

The words "without leaving" children ought to be construed as equivalent to "without having had" children, according to well-established principles, so as to support the previous vested interest: *Howgrave* v. *Cartier* (1); *In re Hamlet* (2); *Treharne* v. *Layton* (3). There can be no difference in this respect between a gift of annuity and a gift of a capital sum, especially when, as is the case here, the duration of the annuity is fixed by reference to that of a lease, and not with reference to the personal enjoyment of the annuitants.

W. H. Gover, for the Defendants:—

There is no ambiguity in this case, and the cases cited have, therefore, no application. The literal meaning of the word "leaving" is consistent with the scheme of the will and with the terms of the gift over, and ought, therefore, to be adhered to. It is a condition precedent that the child must survive in order that the interest should vest. There is no express gift to a child of *Lucy* except in the direction to pay, and there is no direction to pay until the death of *Lucy*. The terms of the will point to

(1) 3 V. & B. 79. (2) 39 Ch. D. 426. (3) Law Rep. 10 Q. B. 459.

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personal enjoyment by the annuitants; for there is no gift except out of the rents of the leaseholds, and there is an express direction that the leaseholds are not to be sold, preserving the enjoyment of the rents to the annuitants.

Theobald in reply.

KAY, J.:—

In this case the testator gave an annuity to his daughter *Lucy* for life, and if his daughter had children who attained twenty-one, being sons, or, being daughters, attained that age or married, he gave the annuity to those children, in words which I shall presently refer to, during the subsistence of the lease of certain leasehold premises at *Cardiff*, but if the daughter died without leaving any such child or children, then there was a gift over to other persons. She has died without leaving any such children, but she had one child, who in her lifetime attained twenty-one but died afterwards, and before her mother. The question is, whether I am to depart from the literal construction of the words by construing the word "leaving" as equivalent to "having had."

If there were in the first instance a gift of a capital fund to a mother for life and after her death to her children, and if she died without leaving children then over, the word "leaving" might be construed "having," because there was a vesting of the capital fund in the first instance, and the Court would be reluctant so to construe the gift over as to take away from the children the interest previously vested. But I have asked whether that has ever been applied to the case of an annuity, and no authority has been produced to shew that it ever has been so applied. I do not admit that an annuity is on the same footing as a lump sum. An annuity *ex vi termini* involves the notion of personal enjoyment. A sum is directed to be paid from half-year to half-year to a person who is intended to enjoy it. The question after all is, what does the testator mean by his will? Now, in the first place, the testator charged this annuity exclusively, together with other annuities, upon certain leasehold premises at *Cardiff*, and directed that the premises so charged should not be sold; plainly shewing that the income of these premises was the fund from

which the annuities were to be paid. Moreover, the annuities were given in these words. [His Lordship read the terms of the gift as above stated, and continued:—] The question is, whether I am to read the words "in the event of the death of my daughter *Lucy*, without leaving any such child," as meaning "without having had any such child," and, in my opinion, the Court is not justified in making that alteration in the word "leaving" in this will, because it has been argued, and I think with force, that there is no gift of an annuity to the children of *Lucy*, but merely a direction that after the decease of any annuitant, including the daughter *Lucy*, his or her annuity shall be payable and paid half-yearly among such of his or her children as being sons attain twenty-one, or, being daughters, attain that age or marry; and the words "payable and paid," which are the only words under which the child of *Lucy* claims anything, coupled with the fact that the subject with which the testator is dealing is an annuity which can only be payable half-yearly and cannot be capitalized under the terms of the will, seem to me to make it clear that what the testator was thinking of was a personal provision for *Lucy* during her life and after her death a personal provision for any child she might have, which provision was to come, under the words "payable or paid," to the particular individual mentioned out of the income of this leasehold property. Therefore, as *Lucy's* child, who attained twenty-one, died in *Lucy's* lifetime, there was no child of *Lucy* to whom the payment could be made after *Lucy's* death, and the annuity seems to me to have "failed," within the meaning of that word as used in this will, on *Lucy's* death, by reason of there being no child to receive it, and accordingly this provision, that it should go to other persons in the event of her death without "leaving" children, as in the will mentioned, seems to me to express exactly what the testator meant. I have no right in this will to alter the word "leaving" into "having"; and I accordingly hold that, in the events which have happened, the gift over among the survivors of the testator's daughters and grandchildren takes effect.

Solicitors: *Cunliffes & Davenport*, agents for *C. A. Heitzman, Cardiff; Williamson, Hill & Co.*, agents for *H. Heard, Cardiff.*

C. C. M. D.

CHITTY, J.
1890
June 20;
July 30.

In re EYTON.
BARTLETT *v.* CHARLES.

[1878 E. 86.]

Administration Action Fund carried to a separate Account—Charge—Stop Order by Incumbrancers—Undisclosed Prior Claim—Contribution—Res judicata—Priority.

By an order made on further consideration, funds were carried over to "the account of the perpetual annuity of the Defendant and her issue," with a direction to pay the dividends thereon to the Defendant for life. The Defendant charged her interest in this fund, and the incumbrancers obtained stop orders thereon. Subsequently it was discovered that at the time the order was made the Defendant was jointly and severally liable with the testator for breaches of trust which had been wholly made good out of the testator's estate. The order was made in the presence of the Plaintiff, who was not at the time aware of the Defendant's liability in respect of the breach of trust. On a motion by the Plaintiff to obtain contribution from the Defendant to the extent of a moiety of this liability, and to have this claim satisfied out of the funds carried over to the Defendant's separate account, notwithstanding the stop orders :—

Held, that though the Defendant was liable to contribute towards making good the loss occasioned by her breach of trust, and could take nothing beneficially from the testator's estate until she had done so, still, as between the Plaintiff and the incumbrancers, the matter was *res judicata*, and that the incumbrancers were entitled to priority over the claim now made for contribution for breach of trust.

Re Jervoise (1) followed.

MOTION.

The Defendant, Mrs. *Anne Parry Charles*, was entitled to an annuity under the will of *P. E. Eyton*, whose estate was being administered in this action, and by an order of the 12th of August, 1886, made on further consideration of this action, a sum of £802, the amount apportioned in respect of her annuity, was directed to be carried over to a separate account entitled "the account of the perpetual annuity of the Defendant *A. P. Charles* and her issue," with a further direction to invest the same in Consols, and pay the dividends thereon to her "during her life," the usual words, "or until further order," being omitted.

The Defendant *A. P. Charles* shortly afterwards charged her

(1) 12 Beav. 209.

interest, under this order of the 12th of August, 1886, in favour of two incumbrancers, who obtained stop orders thereon, dated respectively the 16th of December, 1886, and the 14th of February, 1887.

The testator *P. E. Eyton* and the Defendant *A. P. Charles* had acted as administrators to the estate of their late mother, *Mary Eyton* (which was also being administered in another action), and had committed breaches of trust involving a loss of £1199, for which they were subsequently found to be jointly and severally liable. In August, 1889, an order had been made in *Mary Eyton's* administration action against the Defendant *A. P. Charles*, as surviving administratrix, to pay this sum into Court, and on her failing to do so, the sum of £1199, with interest, was, by an order made in the above-named action, directed to be raised out of the above-named testator's estate, and carried over to the credit of the estate of *Mary Eyton*.

On the 10th of June, 1890, the Plaintiff, who was also a beneficiary, gave notice of motion for a declaration that the above-named testator's estate was entitled to be recouped by way of contribution one moiety of the sum of £1199 paid thereout, as aforesaid, and that, "notwithstanding the stop orders," the dividends to accrue on the sum of Consols standing to the separate account of the Defendant *A. P. Charles*, might, during her life, or until further order, be applied in satisfaction of the claim, and for an injunction restraining her and her assignees or incumbrancers from receiving the same.

The order of the 12th of August, 1886, had been made in the presence of the Applicant, who was not at that time aware of the Defendant's or the testator's liability in respect of the breach of trust.

The motion was opened on the 20th of June, 1890, when it was ordered to stand over and come on as a non-witness action. The application was now renewed.

Whitehorne, Q.C., and *E. Ford*, for the Applicant:—

That we are entitled, under the circumstances, to contribution is clear: *Birks* v. *Micklethwait* (1). The incumbrancers on

(1) 33 Beav. 409.

CHITTY, J. 1890 *In re* EYTON. BARTLETT *v.* CHARLES.

Mrs. *Charles*' interest in this fund can have no higher rights than she possessed when she gave them these charges as security; and though the liability to contribute to the loss occasioned by the breaches of trust had not been ascertained at the time the order of the 12th of August was made, it was, nevertheless, an existing liability; consequently the incumbrancers took these charges subject to this existing liability and to all equities affecting the Defendant's interest in these funds, though undisclosed when the order carrying them over to a separate account was made. Mrs. *Charles* can take nothing beneficially from this estate till she has made good her share of this liability for breaches of trust committed by her.

We submit that this is a paramount claim, which must be satisfied, notwithstanding the stop orders.

Russell Roberts and *Maidlow*, for the Incumbrancers who had obtained the stop orders:—

The order of the 12th of August is conclusive. Here is a definite order, made in the presence of the Applicant, on the faith of which we advanced money; the matter is *res judicata* as between us and the Plaintiff. We are within the principle of *Rice* v. *Rice* (1), and that class of cases, and it is too late now for the Plaintiff to try and set up a paramount claim.

[*Robinson* on Priority (2) was also referred to.]

Whitehorne, in reply.

CHITTY, J. (after stating the facts, and that the order of the 12th of August, 1886, ought to have contained the usual words, "or until further order," a mistake which, had it been material, he should have rectified, and observing that the Defendant *A. P. Charles* was unquestionably liable to contribute towards making good the losses occasioned by the breach of trust, and could take nothing beneficially from the testator's estate until she had done so, continued):—

But the real point is this. On the faith of this order of the 12th of August, made in the presence of the present applicant,

(1) 2 Drew. 73. (2) Page 55.

other persons have honestly advanced their money; and they say that, in those circumstances, they were entitled to give credit to the order of the Court, which not only set the funds apart, but ordered payment of the dividends arising from these funds to the Defendant *Charles*; and, consequently, they were entitled to act, and have acted, as if these funds were wholly free from this or any other paramount claim. Whether they are right in that contention is the question I have to decide. I think they are right. Where a fund is carried over to a particular separate account, "it is" (as was said by Lord *Langdale* in *Re Jervoise* (1)) "released from the general questions in the cause, and becomes marked as being subject only to the questions arising upon the particular matter referred to in the heading of the account;" then he mentions the consequences of that proposition.

Now, the Respondents rely on the order of the Court, which is equivalent to a judgment. There is no declaration, but it is an order which shews the clear title of the Defendant, Mrs. *Charles*, the annuitant. I think I should be introducing an evil practice if I were not to accede to their argument. There is no authority that Mr. *Whitehorne*, or his junior, with all their search, have been able to produce to the contrary; and the case of *Re Jervoise* shews the general principle as to a separate account. It is well known that bankers and others, when they see an order of the Court carrying over a fund to a separate account, will deal with persons named in that account, thinking they can do so safely. Of course, the mere fact that bankers think they can deal safely with a particular customer is not sufficient to justify me in saying that these parties are right, but I think it is right in principle. When the Court has appropriated the money, and has said in an order that that is the money of the annuitant, Mrs. *Charles*, and said that too in the presence of the present claimant, who being there was bound, if there was some paramount claim, to bring it forward—I say I think that persons dealing on the faith of the orders of the Court are entitled to be protected. Mr. *Whitehorne* said it was not easy to bring forward the claim before. I cannot attend to that. There might have been some inquiry, or some stoppage of the funds, before the orders were made.

(1) 12 Beav. 209.

CHITTY, J.
1890
In re EYTON.
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In my opinion it would be erroneous to introduce any such principle as that which the applicant contended for; and I think that those who do give faith to the orders of the Court, and who say, in substance, it is *res judicata*, and *res judicata* in the presence of those who are entitled to oppose and say the order ought not to be made, ought to be protected. The result, therefore, is, that although this claim would be a good claim as against the Defendant, Mrs. *Charles*, and although the money might have been recalled or stopped from the separate account, if the contention had only been between the Defendant, Mrs. *Charles*, and the present applicant, I think the present applicant comes too late against these incumbrancers. I think Mr. *Maidlow* was right as to the principle on which the Court ought to act, and I think the present case is stronger than the one, of *Rice* v. *Rice* (1), to which he referred, because the Respondents to this motion have the order of the Court, in substance, in their favour. Therefore, that part of the application I must refuse.

[A declaration was eventually made that the Plaintiff was entitled to contribution to the extent of a moiety of the said sum of £1199, and that "without prejudice to the stop orders," the dividends accruing on the fund standing to the separate account were to be applied in satisfaction of this claim.]

Solicitors: *Daubeny & Mead*, agents for *W. Smith & Sons, Weston-super-Mare; Kennedy, Hughes & Kennedy; Lickorish & Bellord.*

(1) 2 Drew. 73.

W. C. D.

In re WEST RIDING OF YORKSHIRE PERMANENT BENEFIT BUILDING SOCIETY.
Ex parte PULLMAN.
Ex parte CHARNOCK.
Ex parte JOHNSON & GREENWOOD.

CHITTY, J.
1890
July 31.

Building Society—Winding-up—Past Members—Liability—Losses—Contribution with present Members—Borrowing Powers—Amount for time being secured by Mortgage—Effect of Rules—Contract.

The rules of a building society constitute a contract between the society and its members, by which the liability of all classes of members is regulated; therefore, on a winding-up, past advanced or past investing members, who have satisfied all their obligations to the society in accordance with the rules, are no longer under any liability to contribute to the losses of the society with present members.

In ascertaining the limits of a power of borrowing under a rule similar to sect. 15, sub-s. 2 of the *Building Societies Act*, 1874, the total amount borrowed from all sources must be included, and also the total amount for the time being secured to the society by mortgages from its members, whether in respect of their shares or otherwise.

ADJOURNED SUMMONS.

This society, which was registered under 6 & 7 Will. 4, c. 32, but never incorporated, was in course of being wound up. Though there were no outside creditors, the assets were insufficient to pay all the investing members in full. In consequence of the decision in the case of this society (1), that advanced or borrowing members were liable to contribute to any losses, together with the investing members, the official liquidator had settled, or proposed to settle, on the list of contributories, all persons who were members of the society at the time any debt still in existence was incurred. The members consisted of advanced or borrowing and investing members. The rules, so far as material to the questions of the liability of (1) past advanced or borrowing, and (2) past investing members, were as follows:—

Rule XVIII.—Whenever the value of a share or shares shall

(1) 43 Ch. D. 407.

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Ex parte JOHNSON & GREENWOOD.

be advanced to any member out of the funds of the society, pursuant to these rules, the property shall be secured to the society by way of mortgage, until the amount of such share or shares shall be repaid to the society with all fines and other payments incurred in respect thereof, and every such mortgage deed shall be made in such form, and shall contain all such covenants, clauses, and provisions, including a power of sale, as are usually inserted in deeds of the like nature.

Rule XXIII.—If any member who shall have executed a mortgage to the society shall be desirous of paying off or redeeming the same, it shall be lawful for him so to do, after notice to the manager of his intention, by paying to the manager the amount determined at that date or period of his membership by the tables of this society, together with the full amount which shall then be due from him to the society for subscriptions, fines, and other payments, including a further sum of 2*s.* 6*d.* per share by way of redemption fees; and thereupon, or as soon after as conveniently may be, the mortgage deed, endorsed with a receipt in the form set forth in the schedule hereto, and signed by the trustees of the society, and all other deeds and documents relating to the mortgaged property shall be delivered to the mortgagor.

Rule XXIX.—1. Any person who shall have been a member of the society for six months, and shall not have received any advance out of the funds of the society, shall be at liberty to withdraw from the society upon any of his monthly subscription meetings, upon giving to the manager one month's previous notice in writing of his intention, and upon payment to the society at the time of serving such notice of a fine of 1*s.* per share, and the full amount then due from such member for subscriptions, fines, and other payments.

Rule XXXVI.—1. As soon as it shall appear by the society's books that the amount or value of the share of £120, or fractional part of a share of any member is realized, such member shall receive the same, subject to the deductions set forth in the tables of the society; and should he wish to continue a member of the society, he may do so upon re-entering the same and paying the re-entrance fees.

2. If any member shall have received in advance the value of the share so realized, the trustees for the time being, shall, at the cost of the several members requiring the same, endorse upon every mortgage given to the society by such member a receipt for all moneys intended to be secured thereby in the form set forth in the schedule hereto, pursuant to 6 & 7 Will. 4, c. 32, s. 5, and shall deliver up the same with all other deeds and documents which shall have been deposited by such member.

Rule XXXIX.—Provided that surplus profits, after providing for all liabilities, should be appropriated equitably, equally between the investing and borrowing members in proportion to their shares and the period subscribed for.

Rule XL.—Provided that the directors should look into the gross receipts and expenditure of the society every three years and apportion any deficiency of income among investing and borrowing members.

The proviso for redemption in the mortgages to the society was upon payment of all subscriptions and moneys which, by the society's rules, for the time being should from time to time become payable in respect of the said shares.

Pullman became a member of the society in February, 1883, received an advance on his shares, for which he gave a mortgage in the usual form, and which he paid off in October, 1887, together with all that was due from him in accordance with the rules. The statutory receipt was endorsed, and the mortgage deed and all other deeds and documents relating to the mortgaged property were returned to him.

Charnock was an investing member from 1865 to March 1887, during which period some of his shares were realized and paid out to him, and fresh shares were taken; on his final withdrawal he was paid the full value of his shares, including a bonus in accordance with the balance sheets issued by the directors.

These two were treated as test cases as to the liability of past members.

Romer, Q.C., and *W. Baker*, for the Official Liquidator:—

The question as to the liability of these past members is not affected by winding up law at all; it is a question of contract

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under the rules, it has generally been considered in these cases that past members are liable.

Whitehorne, Q.C., and *Levett*, for *Pullman*:—

The rules no longer apply to me now that I have redeemed my mortgage, taken my receipt, and received all my deeds. I have left the society for good. I could not claim any share in the profits now, if any were declared, neither am I any longer liable to contribute to the losses.

Latham, Q.C., and *Godefroi*, for *Charnock*, adopted the same line of argument and referred to rule 36, providing for the re-entry of a paid-off investing member, as shewing that the rule contemplated his ceasing to be a member when paid off.

CHITTY, J.:—

Mr. *Pullman* was a borrowing member; he gave a mortgage, he paid off all that, according to the rules of the society and the terms of his mortgage, he ought to have paid, and a receipt in the statutory form was endorsed on his deed. There was no fraud whatever, nor anything irregular in the transaction. He thereupon ceased for all intents and purposes to be a member. He could not claim, if there had been a triennial adjustment under rule 40, any profits which had been ascertained; nor again, on the other hand, was he liable for any losses which had been sustained. It is a stated account by the officers of the society between Mr. *Pullman* and the society. These societies could not be worked if accounts like this were liable to be ripped up in the manner suggested. It is a question of contract on the rules under which *Pullman* has got his *quietus*; he is entirely discharged, and therefore his name ought not to be placed on the list of contributories.

Then as to Mr. *Charnock*, he was an investing member. He was entitled to withdraw under rule 29, and he has withdrawn. He stands in a similar position. The contract is that an investing member may go, and go on certain terms which in this case have been complied with. Again, here, there is no suggestion of any impropriety; of course the case would be

different if there were fraud or the like. *Charnock* has withdrawn honestly according to the withdrawal clause; he is no longer a member; he is not liable in respect of the contract. He could not, again, under rule 40 claim any portion of the profits that had been ascertained if the triennial valuation had taken place, and again he is not liable, nor could he have been liable under the rules in respect of any losses which had been ascertained. It is a fair stated account again between Mr. *Charnock* on the one hand and the officers of the society on the other, and his name therefore ought not to be placed on the list of contributories.

In *Johnson* and *Greenwood's* case, two depositors were directed by the Official Liquidator to prove their claims, to test the validity of the borrowings made by the directors, and settle the principles on which the numerous deposits and loans were to be allowed or contested.

The transactions of the society consisted of advancing money to members on their shares, and as this did not exhaust the funds of the society, the directors had also invested other portions of their funds on mortgages to members, not in respect of their shares; and on mortgages to persons not members. At or shortly before the winding up large amounts were outstanding secured by these so-called private mortgages as well as the amounts secured to the society by mortgages from its members in respect of their shares.

The borrowing powers of the directors were defined by rule 24, the material portions of which were as follows:—

Rule XXIV.—1. The directors with the approval of the trustees may, as occasion shall require, borrow and take up at interest any sum of money from any banker with whom the society's funds shall be deposited, or from any other person.

2. The total amount borrowed, and not repaid, shall not at any one time exceed two-thirds of the amount for the time being secured to the society by mortgages from its members.

Numerous questions had been prepared to be submitted to the Court for its decision, but eventually nearly all of them were directed to stand over to enable some scheme of arrangement to

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be arrived at. The questions which were submitted and decided, and which call for any notice in this report were:—

1. Whether for the purposes of rule 24 "the amount for the time being secured to the society by mortgages from its members" includes (*a*) moneys secured to the society by mortgages from persons who were only borrowers, and had no other connection with the society, (*b*) moneys secured to the society by mortgages from persons who were members of the society but not advanced to such persons in respect of their shares.

Romer, Q.C., and *W. Baker*, for the Official Liquidator, stated the question.

Byrne, Q.C., and *Levett*, for *Johnson* and *Greenwood*.

CHITTY, J., without requiring any argument, decided (*a*), in the negative; (*b*), in the affirmative.

The next question was, whether, for the purposes of rule 24, moneys borrowed by the society and lent to persons who were not members, ought to be included in "the total amount borrowed."

Byrne, Q.C., and *Levett*, for the Depositors:—

In construing this rule amounts lent or borrowed to or from persons not members is not to be taken into account; outside borrowing must be set off against outside lending for the purposes of this rule.

Romer, in reply.

CHITTY, J.:—

I cannot see that there is any real question as to the meaning of this 24th rule. There is a limited power of borrowing, and the right way to read the rule is to see the state of the accounts at the moment when it is proposed that the society shall borrow further money. The rule runs "the total amount borrowed and not repaid"—that is the total amount for the time being owing on loan and not repaid—"shall not at any one time exceed two-thirds of the amount for the time being secured to the society

by mortgages from its members." There the first term is "total amount borrowed," and there is no limitation. It is not "borrowed from members"; it is borrowed from anybody. But in the second term with which it is compared, it is not "the total amount for the time being secured to the society by mortgages" generally, or simply; but it is by a particular class of mortgages, viz., "mortgages from its members." Consequently, the right way to read and work the rule is simply this: at a given point of time the question with the officers of the society is whether they can take up on loan any more money than they have already borrowed: they look to their securities, that is to say, their mortgages by members, and I will assume that they find that there is £10,000 secured to the society by mortgages from its members. Then the rest is very easy: two-thirds of £10,000 is £6666 13*s.* 4*d.* How much has been borrowed up to this moment, £5000? From members? It does not matter, you look to the whole amount, and £5000 being the amount already borrowed, they can only borrow £1600 13*s.* 4*d.* more; if they have borrowed up to the full amount of £6666 13*s.* 4*d.*, they cannot borrow more. There is no mystery about the rule, it is expressed in plain terms; I quite agree it might have been expressed in different terms; there might have been an entirely different rule; but I am not at liberty to alter it; I must interpret it as it stands.

Solicitors: *Burn & Berridge*, agents for *J. R. Farrar, Halifax; J. H. Bridgford*, agent for *Jubb, Booth, & Helliwell, Halifax.*

W. C. D.

CHITTY, J.
1890
July 31;
Aug. 5.

In re EARL OF LUCAN.
HARDINGE *v.* COBDEN.

[1888 L. 1528.]

Annuity—Charge on Reversionary Interest in Stock—Contract or Assignment—Volunteer—Specific Performance—Equitable Charge—Insufficient Estate—Creditors—Priority.

An annuity was granted by deed in consideration of love and affection to *C.*, charged on certain hereditaments and upon the "moneys, securities for money, and other effects" of the grantor. At the date of the deed the grantor was entitled to a reversionary interest in stock standing in the names of trustees. The annuity was regularly paid for more than twenty years by the grantor, but on his death his personal estate proved insufficient to pay his debts, and the real estate was not enough to provide for the annuity:—

Held, so far as the charge on the reversionary interest in the stock was concerned, that the deed depended only upon contract, and did not create a perfect and complete equitable charge in favour of *C.*, and that as there could be no specific performance of a contract in favour of a volunteer, *C.* had no priority over the creditors of the grantor.

Donaldson v. *Donaldson* (1) discussed.

ADJOURNED SUMMONS.

By an indenture dated the 10th of October, 1867, and made between the Earl of *Lucan* of the one part, and *Ellen Cobden* of the other part, after reciting that the Earl was seized in fee simple of certain lands, tenements, and hereditaments, and was also possessed of and interested in certain other lands and tenements for a term of years, and was also the owner of "various properties, chattels, moneys, and securities for money, and other effects of several natures and descriptions," and that he was minded to secure the said *Ellen Cobden* an annuity or rent-charge of £300 for her life, it was witnessed that, "for and in consideration of the love and affection" which he had for the said *Ellen Cobden*, and "for various other good and sufficient considerations," the said Earl did grant unto the said *Ellen Cobden* an annuity of £300, "to be issuing and payable out of, and charged and chargeable upon, all that and those the said

(1) Kay, 711.

several lands, tenements, and hereditaments, the property of the said Earl of *Lucan*, and also upon the said several chattels, goods, moneys, securities for money and other effects of the said Earl," to hold the said annuity unto the said *Ellen Cobden*, her executors and administrators, for and during her natural life, and payable half-yearly, commencing from September 30, 1867.

The deed contained a proviso against any assignment by the annuitant, and covenants by the Earl for payment of the same, and for further assurance "during the continuance of this security and the subsistence of the annuity."

At the time when this deed was executed the Earl was entitled to a reversionary interest in a sum of about £12,000 railway stock standing in the names of the trustees of his late father's will, which had been bequeathed to him subject to a prior life interest therein, which was still subsisting; he was also possessed of certain family plate and pictures, and was seized of a small amount of real estate.

The annuity was regularly paid by the Earl down to September, 1888; but on his death, in November, 1888, his personal estate was found to be insufficient to meet all his liabilities, and the real estate alone was not sufficient to provide for the annuity.

An inquiry had been directed in the above-mentioned action, which had been commenced for the administration of the Earl's estate, whether the claim of the said *Ellen Cobden* as a creditor in respect of the deed of annuity, was to any and what extent valid, and whether, if valid, she had a charge upon any and what part of the Earl's estate.

The Chief Clerk, by his certificate of the 16th of June, 1890, found that she had a valid claim, which gave her priority over subsequent creditors, and that a sum of £438 was then due for arrears; the Plaintiffs, the executors of the Earl, thereupon took out a summons to vary this finding, which was adjourned into Court, and now came on for argument.

Vaughan Hawkins, for the Plaintiffs, after stating the facts, admitted that there was a valid charge created by the deed on the real estate of the Earl, but that being voluntary, it created

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no charge on the Earl's reversionary interest in the railway stock, so as to give the Defendant any priority over the other creditors.

E. Ford, for the Defendant, *Ellen Cobden*:—

I do not contend that any of the pictures or plate can be charged; but as to the reversionary interest, I say the deed was effectual. A voluntary assignment of a reversionary interest in a sum of stock is good: *Re Way's Trusts* (1); *Donaldson* v. *Donaldson* (2); *Kekewich* v. *Manning* (3); and this charge is equivalent to a partial assignment, and is therefore good *pro tanto*. According to *Donaldson* v. *Donaldson* I could compel the trustees of the stock to transfer a sufficient amount thereof to me to meet my annuity, without making the Earl or his repretatives parties: I am in the same position as an assignee. The Earl, as the *cestui que trust* of this stock in the hands of the trustees, has by this deed, in effect, directed that a portion of it shall belong to me, this creates a valid trust in my favour which I can get enforced here, even though the deed was voluntary: *Rycroft* v. *Christy* (4). The effect of this deed was to place the Defendant, to the extent of the value of her annuity, in the same position as the Earl. I submit that I have a charge on this stock in the hands of the trustees which can be enforced in Equity, and which gives me priority over any subsequent creditors. [*Milroy* v. *Lord* (5); *Richards* v. *Delbridge* (6), were also referred to.]

Vaughan Hawkins, contrà:—

The deed cannot operate equitably; had there been an assignment of the whole, or a part of the Earl's interest, in this stock, or had the transaction been for value, the argument for the Defendant would be correct; but here there has been no perfect and complete gift or alienation, as mentioned in *Kekewich* v. *Manning*. The charge professedly created by the deed is an imperfect voluntary gift: *Milroy* v. *Lord*; or at most depends

(1) 2 D. J. & S. 365.
(2) Kay, 711.
(3) 1 D. M. & G. 176.
(4) 3 Beav. 238.
(5) 4 D. F. & J. 264.
(6) Law Rep. 18 Eq. 11.

only on contract, which cannot be specifically performed in favour of a volunteer: *Tailby* v. *Official Receiver* (1); *Sloane* v. *Cadogan* (2). A gift of this kind is complete only when no further act is required to be done by the donor or the donee: *Edwards* v. *Jones* (3). That is not the case here; and as far as this reversionary interest, and the pictures and plate are concerned, this claim must fail. [*Lewin* on Trusts (4), and *Cochrane* v. *Moore* (5), were also referred to.]

Ford, in reply.

CHITTY, J. (after observing that the deed though voluntary created a charge on the real estate which was unquestionably valid, but that with reference to the covenant for payment, the deed being a voluntary deed, the covenantee would be postponed in equity to creditors for value; neither could she for the same reason have specific performance or any assistance by a Court of Equity by virtue of the covenant for further assurance, continued):—

Then there remains this singular point. At the time when the deed was executed the Earl of *Lucan* had a reversionary interest in a fund, held by trustees upon trust for some one for life, with remainder to himself, and the deed recites, amongst other things, that the Earl is possessed of and interested in, various properties, chattels, moneys, and so forth. And then the operative part of the charge is not merely on the lands; but the charge is on the several gifts, chattels, moneys, and securities for moneys, and other effects, of the Earl. It is admitted by Mr. *Vaughan Hawkins*, who argued for the executors, that there is really no question of construction on the instrument, and that it is sufficient, had it been for value, to charge the Earl's reversionary interest in the trust fund that I have mentioned. But, though that point is conceded, it is not conceded that this deed can have any operation, equitable or otherwise, against the reversionary interest itself since it is not given for value.

The argument for the annuitant was founded upon *Kekewich* v.

(1) 13 App. Cas. 523.
(2) Sugden's V. & P., 11th Ed., App. No. 24.
(3) 1 My. & Cr. 226.
(4) 8th Ed., p. 70.
(5) 25 Q. B. D. 57.

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Manning (1), *Donaldson* v. *Donaldson* (2), and *Re Way's Trusts* (3). The substance of the argument is that the Earl, as owner of that reversionary interest, had the right to assign the reversionary interest by way of gift, and that the effect of such a gift by deed though not for value, would be to place the donee in the same position as the Earl. In other words, to substitute for the Earl the person in whose favour the gift had been made. That argument is accepted by the other side to a certain extent, and rightly; because, if the Earl had plainly on the face of the deed given this reversionary interest to the lady, that would have been a good gift, and she then could, when the reversion fell in, have given notice at once to the trustee (though that would not have been necessary for the purpose of perfecting the gift), and could have gone with this deed and asked the trustee to assign the trust fund to her. All that is admitted. The argument so far is quite correct.

Then comes the question whether this deed creates a perfect and complete equitable charge. It is unnecessary to say in the case of a gift, the gift must be complete, and equity will not assist in completing an imperfect gift, though it is equally plain that equity will protect a donee who by a valid gift has obtained the title to the enjoyment of the thing that has been given.

Now in *Donaldson* v. *Donaldson*, Sir *William Page Wood* not putting it exactly as a test, did put this proposition, that the equitable assign could go to the trustee and ask for a transfer, and if the transfer of the fund is refused, could institute a suit against him, and obtain the transfer from the trustee without making the donor a party. The proposition perhaps was put by way of illustration to shew the completeness of the gift.

Now it appears to me, in this case, that I cannot hold in favour of the annuitant, because the thing itself, that is the reversionary interest, is not given and not transferred by the deed, but the utmost that the deed does is to create a charge. If the annuity had fallen into arrear two or three years after it was granted, and the tenant for life of the trust fund was still living, could this

(1) 1 D. M. & G. 176. (2) Kay, 711.
(3) 2 D. J. & S. 365.

lady have instituted an action against the trustee for the purpose of having her annuity raised out of the reversionary interest? Plainly not. Could she have instituted an action against the donor? I think this really brings me to the point of the case. What is given is not the thing but a charge upon the thing. That is the true effect of the deed. Then the Court would be asked, in such a suit as I have suggested, by the voluntary donee whether the thing, which has not been given, could be sold, for the purposes of raising the arrears of the annuity. That appears to me to bring me to this conclusion, that it is not perfect as it stands, and I think that this right, which must be contended for on the part of the lady, and has been contended for on the part of the lady, by her counsel, is a right which, when the matter is carefully analysed, depends upon contract. Of course, so soon as I have got to that point, that it is upon contract, then there can be no performance of the contract and no assistance given to the volunteer by a court of equity in the performance of the contract. The right, which would thus be claimed by the lady, would not be the mere right of having the thing given protected, but it would be a right, if it existed, to have that which was not given sold in order to make good the gift.

For these reasons I think that the lady's claim fails.

Solicitors: *Farrer & Co.; T. Gill.*

W. C. D.

CHITTY, J.

1890

Aug. 5.

In re ANDERTON AND MILNER'S CONTRACT.

Lessor and Lessee—Agreement for Lease—Usual Covenants—Proviso for re-entry—Non-payment of Rent—Conveyancing and Law of Property Act, 1881 (44 & 45 *Vict.* c. 41), s. 14.

A., in consideration of £230 agreed to grant to *B.* a lease for seventy years at an annual ground rent of £12 12*s.*, payable quarterly, "subject to the usual covenants to insure from loss by fire, repair, and pay rent and all outgoings that may be charged on the property and ground."

The lease as prepared and settled by the conveyancing counsel contained a proviso for re-entry, not only for non-payment of the rent but also for the breach of any of the clauses, covenants, conditions, and assignments in the lease:—

Held, that the proviso for re-entry ought only to be made to extend to the non-payment of rent.

The law on the subject is still the same as laid down by *James*, L.J., in *Hodgkinson* v. *Crowe* (1), and has not been altered by the *Conveyancing and Law of Property Act*, 1881 (44 & 45 Vict. c. 41), s. 14.

ADJOURNED SUMMONS.

By an agreement dated the 19th of February, 1890, and made between *Anderton* as vendor or lessor of the one part, and *Milner*, as purchaser, of the other part, it was agreed that in consideration of the sum of £230 paid by *Milner* to *Anderton*, the vendor would grant to the purchaser a lease for the full term of seventy years from the 25th of December, 1889, of certain houses therein mentioned at an annual ground rent of £12 12*s.*, payable quarterly, "and subject to the usual covenants—to insure from loss by fire, repair, and pay rent and all outgoings that may be charged on the property and ground. The preparation of the lease and counterpart shall be done by the vendor's solicitor at the purchaser's expense, and it shall contain the usual and proper covenants hereinbefore mentioned."

The lease as prepared by the vendor's solicitor contained the covenants mentioned in the contract, namely, To pay rent clear of land-tax, tithe and other rates, To repair, keep, and deliver up in repair, and permit the lessor to enter and view the state of repairs, To insure against fire, and To register with the lessor all

(1) Law Rep. 10 Ch. 622.

assignments and other dispositions, and also contained a proviso for re-entry in case of non-payment of the yearly rent and in the event of any breach being made in all or any of the clauses, covenants, conditions, and assignments thereinbefore contained on the part of the lessee to be observed, performed, fulfilled, and kept.

The lessee having objected to the proviso for re-entry extending to any of the covenants other than the payment of rent, and the lessor insisting on the proviso being inserted as prepared by him, the latter took out a summons for the settlement and determination of the form of and the covenants in the lease to be granted pursuant to the contract, and the form of lease having been referred to one of the conveyancing counsel to the Court, he submitted that the proviso for re-entry ought to extend to the breach of any of the covenants in the lease, and ought not to be confined only to non-payment of rent.

The summons was adjourned into Court.

Percy Wheeler, for the vendor:—

I submit that having regard to the law as altered by sect. 14 of the *Conveyancing Act*, 1881, which gives a right of re-entry for a breach of any covenant or condition in a lease, the draft as settled by the conveyancing counsel should stand.

When *Hodgkinson* v. *Crowe* (1) was decided in 1875, no relief against re-entry for breach of covenants in a lease could be obtained except in the case of a covenant for payment of rent, or in case of accident, or surprise, or in any special circumstances where a court of equity could grant relief; but now both at law and in equity the lessee can be relieved in case of all such covenants as are contained in the draft lease.

The law as laid down in *Bennett* v. *Womack* (2) applies to this case, and I submit that the landlord ought to have a right of re-entry if after notice pursuant to sect. 14 of the *Conveyancing Act*, 1881, a breach of the covenant to repair is not remedied by the lessee at any time during the term for which the lease is granted.

(1) Law Rep. 10 Ch. 622. (2) 7 B. & C. 627.

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[He also referred to *Hampshire* v. *Wickens* (1), *Brookes* v. *Drysdale* (2), and *Wilkins* v. *Fry* (3).]

D. L. Alexander, for the purchaser:—

The law on the subject is the same now as when *Hodgkinson* v. *Crowe* (4) was decided in 1875. Sect. 14 of the *Conveyancing Act*, 1881, has made no alteration. In sect. 2 of the *Leases and Sales of Settled Estates Act*, 1856 (19 & 20 Vict. c. 120), the proviso for re-entry is upon non-payment of rent only, and in the *Settled Land Act*, 1882 (45 & 46 Vict. c. 38), s. 7, there is the same proviso.

[He was stopped by the Court.]

CHITTY, J.:—

The question in this case is as to the frame of a proviso for re-entry in a lease which has been referred to the conveyancing counsel, to be settled in accordance with the contract between the parties. The contract is for a lease of some house property for seventy years, at a ground rent of £12 12*s.*, with the additional consideration of £230, paid by way of premium—in other words, the contract is in part one of a purchase of the term, and in part a taking at a rent. The property is to be held for the term mentioned "subject to the usual covenants—to insure from loss by fire, repair, and pay rent and all outgoings," and the lease is to contain "the usual and proper covenants hereinbefore mentioned."

It is plain, therefore, that the parties here defined, in more or less precise language, what are to be considered to be usual covenants, and beyond these no covenants are to be inserted. The contract, which is not well drawn, does not contain any mention as to a proviso for re-entry, consequently, the proviso to be inserted in the lease must be reasonable, and one which, according to the course of practice prevailing among conveyancers, is usually inserted in leases of this class.

Now this question came before the Court of Appeal in the case

(1) 7 Ch. D. 555.
(2) 3 C. P. D. 52.
(3) 1 Mer. 244.
(4) Law Rep. 10 Ch. 622.

of *Hodgkinson* v. *Crowe* (1). The agreement there was to grant a mining lease, and the lessor insisted on the insertion of a proviso for re-entry upon breach of any of the covenants or agreements in the lease, but it was held that he was entitled to it only on non-payment of rent. The decision was on a mining lease, but the judgment proceeded on the general principle that the form of proviso claimed was neither usual nor reasonable in leases.

It is true that among the grounds for this conclusion stated by Lord Justice *James* in his judgment, one is that for the breach of many covenants, other than that for payment of rent, a Court of Equity could not relieve. This decision was in 1875, and so far as I am aware, no practice has arisen since then which renders the insertion of a proviso for re-entry on breach of any covenant usual; such a practice might, in process of time, arise, but the lessor, on whom the burden lies of proving this, has not done so.

The learned conveyancing counsel, to whom the matter was sent, suggests that the insertion of the proviso in this form is proper by reason of the alteration in the law made by the *Conveyancing Act*, 1881, s. 14, by which the right of re-entry for breach of covenant is enforceable only after notice to the lessee, and after giving him an opportunity of making compensation for the breach, and subject to certain excepted cases which are, for the present purpose, immaterial, the Court is empowered to grant relief. In this state of the law a different practice might conceivably have arisen with respect to the proviso for re-entry, and may do so in the future, but that is not the question now, which is, whether this change in the law made by the *Conveyancing Act* makes any difference in the existing law on the subject of this proviso. I think it does not.

Lord Justice *James* refers in his judgment to the requirement as to a proviso for re-entry contained in the *Leases and Sales of Settled Estates Act* (19 & 20 Vict. c. 120) being limited to non-payment of rent; there is a similar requirement in the *Settled Estates Act*, 1877 (40 & 41 Vict. c. 18), s. 4; and again in the *Settled Land Act*, 1882 (45 & 46 Vict. c. 38), s. 7, which is subsequent in date to the *Conveyancing Act*. It appears, therefore,

(1) Law Rep. 10 Ch. 622.

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that the legislature considered a proviso for re-entry on non-payment of rent to be usual in leases, and, therefore, required its insertion in leases by limited owners.

I may add that where, as in this case, a premium is paid, which is, in fact, a purchase *pro tanto* of the term granted, it would be a strong act to allow the insertion of a proviso for re-entry, such as would enable the lessor to destroy the term he has granted.

Solicitors: *Godden S. Hare; Charles Barfield.*

G. M.

BELLAMY *v.* DEBENHAM.

NORTH, J.

1890

July 15.

[1889 B. 2715.]

Vendor and Purchaser—Specific Performance—Contract contained in Letters—Offer and Acceptance—Subsequent Correspondence.

Though, when a contract is contained in letters, the whole correspondence should be looked at, yet if once a definite offer has been made, and it has been accepted without qualification, and it appears that the letters of offer and acceptance contained all the terms agreed on between the parties, the complete contract thus arrived at cannot be affected by subsequent negotiation.

When once it is shewn that there is a complete contract, further negotiations between the parties cannot, without the consent of both, get rid of the contract already arrived at.

Hussey v. *Horne-Payne* (1) and *Bristol, Cardiff, and Swansea Aërated Bread Company* v. *Maggs* (2) discussed.

TRIAL of action for the specific performance of an agreement by the Defendant for the purchase of a house and land.

The agreement was alleged to be contained in two letters.

At the beginning of April, 1889, the Defendant was in correspondence with Mr. *F. Sanders*, an agent of the Plaintiff, with regard to a proposal which the Defendant had made, on behalf of the committee of a hospital, to purchase from the Plaintiff for the purposes of the hospital a freehold house and land, called *Effingham Place*, situate at *Cheshunt*. Ultimately, on the 17th of April, 1889, the Defendant wrote to Mr. *J. S. Bridgeman* (also an agent of the Plaintiff) a letter which was headed, "*Effingham Place*," and in which he said: "I am prepared myself to offer you £800 for the freehold, with possession at Midsummer, and run the risk of inducing the committee to take it off my hands. I am assuming, of course, that the title is satisfactory, and that all the ground now occupied with the house is included." On the 18th of April *Bridgeman* wrote in reply: "I am obliged by your letter of the 17th inst., and am instructed by Mr. *Sanders* to accept your offer of £800 for the freehold therein contained, subject to the owner's ratification, of which he entertains no doubt, and for

(1) 4 App. Cas. 311. (2) 44 Ch. D. 616.

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which he will at once apply." On the 25th of April the Defendant wrote to *Sanders*: "I have no wish to press you unduly, but I cannot allow my offer to stand over indefinitely, and, as we have a committee meeting to-morrow evening, if I do not hear that the owners accept it before 5 P.M. to-morrow, I must consider myself at liberty to withdraw it." On the same day *Sanders* wrote to the Defendant a letter headed, "*Effingham Place*," in which he said, "I am pleased to inform you the owner confirms the sale of above to you for £800. Possession to be given at Midsummer next. Kindly let me know if the contract shall be prepared in your name or that of the committee." On the 29th of April the Defendant replied: "The committee have decided not to buy the property, so that the contract must be made out in my name, and can be sent to my solicitor, Mr. *T. G. Bullen*." On the 3rd of May the Plaintiff's solicitors wrote to the Defendant's solicitor: "We are instructed by Mr. *Bellamy* to send you the inclosed draft contract for sale of *Effingham Place* to your client, Mr. *F. G. Debenham*, for approval on his behalf. On receipt of the draft approved, we will lose no time in exchanging contracts, and we will then send you abstract of title."

The draft contract sent with this letter provided that "the abstract of the vendor's title shall commence with a will of a testator who died in 1863, and no proof shall be required of the testator's seizin or ownership. The purchaser shall not require the production of, or investigate, or make any requisition or objection in respect of, the prior title, whether the same is recited, covenanted to be produced, or otherwise noticed in any abstracted deed or document or not"; and it contained several other special conditions as to evidence of identity of the property and verification of the title. It also provided that the property was to be sold subject to the existing tenancy. The Defendant's solicitor struck out all those special conditions, and returned the draft thus altered to the Plaintiff's solicitors, with a letter, dated the 7th of May, in which he said: "I beg to return the draft agreement which I have settled on behalf of the proposed purchaser. I cannot accept the special conditions."

On the 14th of May the Plaintiff's solicitors wrote to the Defendant's solicitor: "We return draft agreement. We cannot

consent to all your alterations, which, in fact, make the contract almost an open one. We submit that none of the conditions are special. You will observe that our client does not insist upon the payment of any deposit, and will allow the fixtures belonging to the landlord to pass with the house."

On the 17th of May the Defendant's solicitor wrote to the Plaintiff's solicitors :—

"In reference to your letter of the 14th inst., returning the draft agreement, I am sorry I cannot advise Mr. *Debenham* to go on with the negotiation. Two points were of the greatest importance—that there should be clear possession on the 24th of June, and a title that trustees could accept. I return your draft."

On the 18th of May the Plaintiff's solicitors wrote to the Defendant's solicitor :—

"We cannot understand the objections which you raise to the draft contract. We appreciate the importance of the points you mention.

"With reference to the title, we propose to commence the abstract with the will of an ancestor of the present owner, who died twenty-five years ago. We could, of course, go back further, but we do not know what would be gained by doing so. The property has been in the hands of the *Bellamy* family for several generations. We inclose, without prejudice, the abstract of title, that you may judge for yourself as to its sufficiency. We may mention that, when the present owner disentailed the property, we were advised by counsel on the title. With regard to possession at Midsummer, we hear from the land agent that he has agreed with the tenant to give us possession; but we have written to him again to make this quite clear. We return the draft contract, in which we have made a further alteration with reference to possession, and we hope that all difficulty will now be removed, as we are not aware of anything in the form which is unusual."

On the 20th of May the Defendant's solicitor wrote to the Plaintiff's solicitors :—

"I have your letter of the 18th instant, with the draft contract and abstract of title. I have read the abstract. I dare say you

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could carry the title back, and shew that the property was part of the estate of *Anna Maria Bellamy*; and who *Cayley Shadwell* was; but I see there is this fatal objection—that your client has not the mines and minerals. The minerals are very valuable in *Cheshunt*. I am very sorry not to do business; but I cannot possibly advise my client to go on with the matter. I return the draft contract and abstract."

On the 25th of May the Plaintiff's solicitors wrote to the Defendant's solicitor:—

"We received your letter of the 20th instant, and confess that we were much surprised at its contents. The rights of the lord of the manor are, we understand, worthless; but, to avoid any question with your client, Mr. *Bellamy* has agreed to purchase them, so that we shall be able to convey the fee simple on the 24th of June, as agreed. Please return the contract (inclosed) approved, at your early convenience. The tenant is moving out of the house, so as to give possession at Midsummer."

On the 27th of May the Defendant's solicitor wrote to the Plaintiff's solicitors:—

"I have received your letter of the 25th instant, with the draft agreement. I take leave to remind you that I wrote to you on the 17th instant that I could not advise my client to go on with the negotiation, and I so informed him, and he has given up all idea of the purchase. He is away from home, and I really cannot re-open the matter. I return the draft."

On the 8th of June the Plaintiff's solicitors replied, that they were advised by counsel that the correspondence made a good contract, saying:—

"The question raised by you about the minerals is one which we are prepared to remove before the time of completion. There was a binding contract by letter, which in our case left no further terms to be arranged. It is true we sought to introduce further details as to title, &c., in our draft contract; but we are willing, if there is to be a formal contract, that it should be in the form approved by you on 7th May last."

The Defendant's solicitor did not reply to this letter, and on the 22nd of June, 1889, the writ in this action was issued.

By his statement of claim the Plaintiff claimed the specific performance by the Defendant of the agreement constituted by the letters of the 17th and 18th of April, 1889, and the two letters of the 25th of April, 1889.

By his statement of defence the Defendant admitted that he entered into negotiations with the Plaintiff to buy the property, but he did not admit that he ever agreed to buy it. He did not admit that the letters in question amounted to a contract, or that no further contract was necessary. He craved leave to refer to the whole correspondence. He relied on the letter of the 17th of May as putting an end to the negotiations, and said that, even if the letters which the Plaintiff alleged to constitute a contract amounted to a contract, the Plaintiff prior to the 17th of May refused to carry out the contract, and the Defendant in consequence became entitled to rescind the same, and the letter of the 17th of May was a rescission of the contract (if any). He also relied on the subsequent letters of his solicitor as a rescission, and pleaded the 4th section of the *Statute of Frauds* as a defence.

There was evidence that the Plaintiff had ratified his agent's acceptance of the Defendant's offer to purchase, and that the Defendant had, on the 16th of May, told his solicitor that he would have nothing further to do with the property. It was proved that in April, 1889, arrangements were made with the tenant of the property that he should give up possession on the 24th of June, 1889, and that he in fact gave up possession on that day. It was also proved that, prior to the 27th of May, the agent of the lord of the manor had verbally promised that the lord would convey his rights in the mines and minerals under the property to the Plaintiff, and that on the 18th of June the lord had given authority to his agent to convey to the Plaintiff his rights in the mines and minerals under *Effingham Place* and some other land in consideration of the sum of £10 10*s*. This conveyance was afterwards carried out by a deed dated the 2nd of September, 1889.

Napier Higgins, Q.C., and *Medd*, for the Plaintiff:—

A complete contract was contained in the letters of the 17th

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and 18th of April, and the subsequent ratification by the Plaintiff. No other written document was needed, except as a matter of form: *Rossiter* v. *Miller* (1); *Bonnewell* v. *Jenkins* (2); *Bolton Partners* v. *Lambert* (3); *Gray* v. *Smith* (4). The Defendant had no right to rescind at the time when he gave notice to do so; and, even if he had, he did not give an effectual notice of rescission. The Plaintiff had shewn a good title before the notice was given: *Wylson* v. *Dunn* (5); *In re Bryant & Barningham's Contract* (6); *Dart's* Vendors and Purchasers (7).

Cozens-Hardy, Q.C., and *MacSwinney*, for the Defendant:—

There never was a complete contract. When a contract is alleged to be contained in correspondence, you must look at the whole of the correspondence, and not stop short at any particular letter: *Hussey* v. *Horne-Payne* (8); *Bristol, Cardiff, and Swansea Aërated Bread Company* v. *Maggs* (9).

[NORTH, J.:—There is a clear contract in the two letters of the 17th and 18th of April as they stand. Why should a subsequent proposal by the vendor to add some new terms, which the purchaser is not willing to accept, affect the existence of that contract? Suppose, for instance, the vendor proposed that the purchaser should give him a right of way over the land? Why should a contract, which is complete as it stands, be the less a complete contract because one party afterwards suggests an addition which the other will not accept? I agree that you must look at the whole of a correspondence, and, if it shews that the letters, which appear to constitute a complete contract, do not in fact contain all the terms which had been previously agreed on between the parties, the Court will not hold that there was a complete contract.]

Bristol, Cardiff, and Swansea Aërated Bread Company v. *Maggs* is undistinguishable from the present case. The Plaintiff, by insisting on terms which are not contained in the letters which

(1) 3 App. Cas. 1124, 1139.
(2) 8 Ch. D. 70.
(3) 41 Ch. D. 295, 305.
(4) 43 Ch. D. 208.
(5) 34 Ch. D. 569.
(6) 44 Ch. D. 218.
(7) 6th ed. p. 1178.
(8) 4 App. Cas. 311.
(9) 44 Ch. D. 616.

he now says constitute a complete contract, shewed that he did not consider that those letters expressed all the terms of the agreement.

The Defendant was entitled to give notice of withdrawal as soon as he discovered that the Plaintiff was not able to give him a title to the minerals under the property: *Forrer* v. *Nash* (1); *Brewer* v. *Broadwood* (2). *In re Bryant & Barningham's Contract* (3) was an entirely different case.

The Defendant was not bound to wait while the Plaintiff was endeavouring to induce the lord to make good his title to the minerals; as soon as he became aware of the defect in the Plaintiff's title he was entitled at once to rescind, and was not bound to wait till the time fixed for completion: *Weston* v. *Savage* (4); *Upperton* v. *Nickolson* (5). The rescission of the contract by the Defendant's solicitor, when ratified, related back to the date of the notice of rescission: *Bolton Partners* v. *Lambert* (6). The Defendant has ratified the act of his solicitor.

Napier Higgins, in reply:—

In *Hussey* v. *Horne-Payne* (7), it appeared, by the letters prior to those which were said to constitute a contract, that the whole of the agreement was not expressed in those letters. There is nothing of that kind in the present case. The decision of Mr. Justice *Kay*, in *Bristol, Cardiff, and Swansea Aërated Bread Company* v. *Maggs* (8), professes to be founded solely on *Hussey* v. *Horne-Payne*.

As to the right of the Defendant to rescind, in *Forrer* v. *Nash*, and *Weston* v. *Savage* (9), the vendor's defect of title related to the whole subject-matter—the very essence of the contract. In *Forrer* v. *Nash* the defect was not removed till after the bill was filed. In *Upperton* v. *Nickolson* (10) the defect of title remained at the date of the decree. The observations of Lord Justice *Cotton* in *In re Bryant & Barningham's Contract* (11)

(1) 35 Beav. 167, 171.
(2) 22 Ch. D. 105, 109.
(3) 44 Ch. D. 218.
(4) 10 Ch. D. 736.
(5) Law Rep. 6 Ch. 436, 444.
(6) 41 Ch. D. 295.
(7) 4 App. Cas. 311.
(8) 44 Ch. D. 616.
(9) 10 Ch. D. 736.
(10) Law Rep. 6 Ch. 436.
(11) 44 Ch. D. 223.

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apply. He there said: "I do not doubt that, if a vendor is able to make a good title before the day fixed for completion of the contract, the contract can be enforced." There was nothing of substance in dispute at the time when the notice of rescission was given. At any rate, that notice was not a good notice.

NORTH, J.:—

The question is, whether the Plaintiff is entitled as against the Defendant to specific performance of an agreement to sell a house to the Defendant.

The contract is contained in letters, and the first material letter is that of the 17th of April, 1889. I think the parties are entitled to have the whole correspondence read; but, looking at the letters before that of the 17th of April, all I find is that a negotiation was going on between Mr. *Bellamy* and Mr. *Debenham*, either directly or indirectly, with a view to the sale by *Bellamy* of a house for the purposes of a hospital, in which apparently both parties took an interest. [His Lordship read the letters of the 17th and 18th of April, and continued:—]

In the letter of the 18th there was a clean acceptance of the Defendant's offer "subject to the owner's ratification." That reference to the "owner" is admitted to be a sufficient description of the Plaintiff to satisfy the *Statute of Frauds*.

In the subsequent correspondence, phrases are used which, it is said, shew that the Plaintiff did not understand those two letters to be a complete contract. I shall have to consider the subsequent correspondence presently; but the next letter of the 25th of April, written by the Defendant, seems to me to shew beyond all question that he then thought there was a complete contract. It should be observed that there is nothing said in either of the letters of the 17th and 18th of April about the agreement being subject to the preparation of a formal contract, or, indeed, any reference to a formal contract. There is merely a clean offer and a clean acceptance contained in those letters so far as they go. [His Lordship read the letter of the 25th of April, and continued:—]

I think there can be no doubt, so far as that letter goes, that

the Defendant then considered that there was an offer, merely wanting the acceptance of the owner to make a concluded contract.

On the 25th of April, the same day, Mr. *Sanders* wrote to the Defendant that "the owner confirms the sale." Down to that point we have a clean offer and acceptance; but in that letter, for the first time, reference is made to a "contract" to be prepared. I do not think that can make any difference. It was open to the parties, if they pleased, to embody the terms contained in the letters in a formal contract, which could not go further, unless both parties consented. There was a reason, therefore, for a "contract" being mentioned. Moreover, it was uncertain who was to be the purchaser of the property, whether the Defendant was buying it for himself or for the committee of the hospital, and it was natural enough to require that a formal contract should be entered into, if in point of fact the purchaser was to be, not the person represented in the letter, but the committee. There was a very good reason, therefore, for suggesting that a further contract should be prepared. On the 29th of April, the Defendant replied that the committee would not buy the property, and that the contract must be made out in his own name; but there is nothing in his letter to shew that he did not take precisely the same view of the "contract" as that which I have just indicated. Moreover, the reference to a "contract" does not seem to point in any way to a further negotiation, because the contract was not to be sent to the Defendant (he being the person who had discussed the terms) but to his solicitor—shewing, as it seems to me, that it was merely for formal purposes that the contract was to be prepared. Then, on the 3rd of May, 1889, the Plaintiff's solicitors wrote to the Defendant's solicitor, sending a draft contract for approval. The draft contract then sent went far beyond anything which was authorized by that which had already taken place between the parties. It may have been a very proper document to prepare, if the parties had been negotiating about terms which they had not yet arranged; but it introduced a number of new terms which the vendor, who had entered into what was practically an open contract, had no more right to require the purchaser to

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consent to than he would have had to stipulate that the purchaser should consent to a doubling of the price. They were new terms not in any way authorized by the contract, and from the terms contained in that document numerous difficulties arose. Some of the new terms were no doubt unimportant, and were pretty nearly matter of course; but others were important, and some of them were actually at variance with the agreement between the parties. I may mention, by way of illustration, that, whereas the letters had stipulated for vacant possession on the 24th of June, the contract provided that the property was to be sold subject to the existing tenancy. That and some other provisions of the draft contract were entirely and absolutely inconsistent with what had been agreed on before.

Then negotiations upon the subject of the proposed contract took place between the solicitors. The Defendant's solicitor did not reject it altogether, as he might have done, upon the ground that the Defendant was entitled to an open contract; but he said in his letter of the 7th of May to the Plaintiff's solicitors, "I cannot accept the special conditions." Putting it shortly, there were certain things which were pretty much matter of course to which he did not object; but to various provisions which he called "special conditions" he did object—and he had a perfect right to do so and to strike them out. The draft agreement was returned by him with these alterations.

On the 14th of May, the Plaintiff's solicitors sent back the draft, with a letter in which they said: "We cannot accept your alterations, which, in fact, make the contract almost an open one. We submit that none of the conditions are special. You will observe that our client does not insist upon the payment of any deposit, and will allow the fixtures belonging to the landlord to pass with the house." As regards the proposal about the fixtures, I do not think there is much in it. It was proposed that the purchaser should pay more than he had agreed to pay, but, on the other hand, that he should have the fixtures. Of course, he was not bound to agree to that; it was a mere proposal, to which he might have assented or not as he pleased. But to some of the conditions inserted, as I have already said, he was clearly not bound to assent in any way. On the 17th of May the Defendant's

solicitor replied, "I am sorry I cannot advise Mr. *Debenham* to go on with the negotiations. Two points are of the greatest importance—that there should be a clear possession on the 24th of June, and a title that trustees could accept," and he returned the draft. On the two points then mentioned the proposed conditions were in conflict with the original agreement.

On the 18th of May the vendor's solicitors wrote in reply, and they admitted that they proposed that the title should commence with the will of a testator who died twenty-five years ago. They gave reasons of more or less weight why the Defendant should assent to the proposed commencement of title; but they stated no reason why he was bound to do so if he did not like it. And, as to the possession at Midsummer, they said they had heard from the land agent that he had agreed with the tenant to give them possession. I should add that the tenant did, in fact, give up possession on the 24th of June; and, therefore, that question was got rid of altogether. Then, on the 20th of May, the Defendant's solicitor wrote that he had read the abstract, and added: "I see that there is this fatal objection—that your client has not the mines and minerals. I cannot possibly advise my client to go on with the matter." That letter was answered by the Plaintiff's solicitors on the 25th of May, and they said that Mr. *Bellamy* had agreed to purchase the rights of the lord of the manor in the mines and minerals: "So that we shall be able to convey the fee simple on the 24th of June, as agreed." That statement was very liable to be misunderstood. As a matter of fact, the Plaintiff had made a merely verbal arrangement with the lord to purchase his rights; but no price had been then fixed, and he had, therefore, no title whatever to the mines and minerals at that time; but he saw his way to getting one, and that is what was meant by the statement that he had "agreed to purchase" the lord's rights. On the 27th of May, the Defendant's solicitor wrote to the Plaintiff's solicitors, reminding them that on the 17th of May he had written to them that, "I could not advise my client to go on with the negotiations; and I so informed him, and he has given up all idea of the purchase. He is away from home, and I really cannot reopen the matter." After that, negotiations took place between the vendor and the

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lord of the manor; and before the 24th of June the lord had agreed at a certain price to sell the minerals to the Plaintiff; but the conveyance was not executed until the 2nd of September. However, that does not seem to be material, for on the 24th of June the vendor was entitled in equity to the minerals. There was no agreement that time should be of the essence of the contract, or that a conveyance of the minerals should be executed on or before the 24th of June; and, in my opinion, the Plaintiff was in a position before the 24th of June to carry out that part of his bargain, if in other respects it was capable of being carried out.

Going back, then, to the letter of the 27th of May, in my opinion, that letter amounted to a repudiation of the contract by the Defendant's solicitor, and I so hold. Whether he had a right to repudiate is another matter, but that was the effect of the letter. Looking at the three letters of the Defendant's solicitor, which culminated in the letter of the 27th, and at the fact that the draft contract and abstract were sent back on each occasion, I think the fair construction of those letters taken altogether is that, at any rate on the 27th of May, the Defendant had put an end to the matter, if it was in his power to do so.

The question then arises, whether it was in his power to do so. As to that, it seems to me that the letters of the 17th and 18th of April, the offer and the acceptance (subject to the owner's ratification), and the subsequent letter of the 25th of April, expressing the owner's confirmation, made a complete contract between the parties. "The owner" is a sufficient definition of the vendor, and all the terms which are material for the purposes of the *Statute of Frauds* are expressed in writing.

But that is not necessarily enough. In *Hussey* v. *Horne-Payne* (1) the rule of law is expressed very neatly, though no new law was then laid down. The contract must be evidenced by writing signed by the party who is to be charged, and the letters which I have mentioned shew such a contract signed by the party to be charged. But it has always been held to be open to a defendant, against whom specific performance is sought, to shew that the written document signed by him did not include

(1) 4 App. Cas. 311.

all the terms of the actual contract, and that he may do that, either by reference to other correspondence which can fairly be read with the letters which are said to constitute the contract, or by means of parol evidence outside the written documents altogether. The Defendant may say, that when a contract is found in correspondence, you must look, not only at the two or three formal letters which are said in themselves to constitute a contract, but also at the other correspondence. It is clear that that may be done. But for what purpose can it be done? *Hussey* v. *Horne-Payne* (1) lays down the law very clearly, and I agree with every word of Mr. Justice *Kay's* comments upon it in *Bristol, Cardiff, and Swansea Aërated Bread Co.* v. *Maggs* (2). In *Hussey* v. *Horne-Payne* there were certain letters which apparently constituted a complete contract; but, on looking into the whole correspondence, it was found that those letters did not contain all the terms of the contract, because the earlier letters shewed that there were other terms then in negotiation, and the later letters also shewed that those terms were still in negotiation and were not concluded. It was clear, therefore, that the letters which were said to constitute the contract did not contain the whole of it, and, that being so, that which was called a contract was not complete, and could not, therefore, be enforced.

In the present case, the letters which passed down to the end of April shew, in my opinion, a complete contract. Is there anything in the other letters, or in the parol evidence, to shew that the terms of the contract were not all contained in those letters? In my opinion, there is not. There are subsequent letters which shew that a discussion, initiated by the vendor's solicitors, took place, in which they proposed to introduce other terms which had not been settled between the parties; but it is not suggested that the terms so proposed had been mentioned before, or had been agreed upon by the parties in the month of April. The question, therefore, is, whether subsequent negotiations can be looked at, merely for the purpose of preventing that which would otherwise be a complete contract from being so. In my opinion, when once it is shewn that there is a complete contract, it is impossible that further negotiations between the parties

(1) 4 App. Cas. 311. (2) 44 Ch. D. 616.

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can, without the consent of both, get rid of what I may call the crystallized contract already arrived at, and as, in the present case, contained in the letters. Of course, it may be an open question whether the terms of the contract really were all settled, and the fact that further negotiations took place, as well as the language of those negotiations, may be very important as throwing light upon the state of things at the time when the alleged contract was signed by the party to be charged. The question is really one of fact; and if, in considering that question of fact, one should come to the conclusion that the negotiations which subsequently took place related to new matter, started for the first time after the contract was complete, in my opinion they would have no weight in preventing full effect being given to the written contract previously existing.

Some of the phrases used by Mr. Justice *Kay*, in *Bristol, Cardiff, and Swansea Aërated Bread Co.* v. *Maggs* (1) seem to me to go further than that. By way of illustration he put a case (2) of a definite offer to sell a business, lease, and goodwill, and a definite acceptance, and after that negotiations between the parties as to whether a new term, limiting the area within which the vendor of the business was to carry on a similar business, should be introduced, and said that in such a case he thought that the purchaser could not disregard all that followed the acceptance of the prior offer, and insist on there being a complete contract by that acceptance.

And then, near the end of his judgment (3), he said (distinguishing the case before him from *Hussey* v. *Horne-Payne* (4): "In this case there was no anterior understanding as to the restriction of the vendor's right to carry on a similar business to that sold. The negotiation as to that arose after the two letters relied on had passed. But it was begun by the solicitors of the plaintiffs, who are now seeking to rely on the two letters only. Their position, therefore, is, that they were not satisfied with the terms of the two letters, but themselves reopened the matter, by negotiating for another most important advantage; and having thus treated the two letters as part of an incomplete bargain, it would

(1) 44 Ch. D. 616.
(2) Ibid. 621.
(3) 44 Ch. D. 624.
(4) 4 App. Cas. 311.

be most inequitable to allow them to say, 'Although we thus treated the matter as incomplete and a negotiation only, yet the defendant had no right to do so, but was bound by a completed contract.'"

In my opinion, subsequent negotiations, first commenced on new points after a contract complete in itself has been signed, cannot be regarded as constituting a part of the negotiations going on at the time when it was signed, because, *ex hypothesi*, the Court has arrived at the conclusion that they were not going on then—that they were not thought of at that time, but related to matters first thought of subsequently.

I do not in any way dissent from the view which Mr. Justice *Kay* took of the case then before him; but those remarks of his, if they meant as much as they might possibly mean, seem to me to go too far, and I should not be prepared to follow them.

Then we come to this—there will always be the question of fact to be decided, whether the written contract does in fact contain all the terms which had been at that time agreed on between the parties.

In the present case we find that the vendor's solicitors proposed to introduce into the formal contract terms which they had no right whatever to introduce, or even to ask for, if they were at variance with the written agreement,—which they had no right whatever to ask for, supposing that the letters written in April contained all the terms of the arrangement which had been then definitely arrived at. It is, therefore, a fair argument to say, that it is impossible that the parties can have arrived at a concluded agreement when the vendor's solicitors took such a step as they did. On the other hand, there is the letter from the Defendant, in which he spoke about the offer which he had made, and said that he should withdraw it unless it was accepted by a definite time.

The conclusion I come to is this—that as the Plaintiff, through his legal advisers, by insisting upon that to which he was not entitled, caused the whole difficulty, it would not be fair between the parties as a matter of equity at this distance of time to enforce the specific performance of the contract.

I, therefore, dismiss the action; but I shall not give costs to either party.

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[With regard to the point as to the minerals, the Judge did not think it necessary to decide it; for if he were to decide it in favour of the purchaser, it would not affect the costs of the action.]

Solicitors: *R. W. Childs, Batten, & Harling; T. G. Bullen.*

W. L. C.

NORTH, J. 1890 *July* 30.

In re BIGNOLD.
BIGNOLD *v.* BIGNOLD.

[1886 B. 5195.]

Legacy—Election—Interest.

A legacy to the testator's wife, in lieu of dower and freebench, carries interest only from the expiration of a year from the testator's death.

THIS was the further consideration of an action to administer the estate of *William Atkins Bignold*, who died in 1884, testate.

The testator bequeathed to his wife, *Harriett*, all the household furniture, plate, linen, china, glass, books, prints, pictures, wines, liquors, stores, and provisions, of which he should die possessed, for her absolute use and benefit. And he bequeathed to his said wife the legacy or sum of £1000, to be paid to her within three months after his decease, for her absolute use. He devised his freehold estates and bequeathed the residue of his personal estate to the trustees of his will on trust to sell and convert the same into money. He desired that his copyhold estates should, so far as the tenure of them would permit, be disposed of according to the trusts contained in his will concerning his freehold estates, and he devised them to such uses as his trustees should within twenty-one years appoint, in order to complete any sale or sales. He directed his said trustees, out of the net moneys to arise from his said real and personal estates, to set apart and invest in their names the sum of £2000 in certain securities, and permit and empower his said wife to receive the annual income of the said sum of £2000, or of the stocks, funds, and securities upon which the same might be invested, so long as she should continue his

widow. After provision for his children, the testator's will contained the following proviso:

"I declare that the provision hereinbefore made for my said wife shall be accepted by her in lieu of all her claim to dower or freebench out of my said estates."

The testator died possessed of copyhold and other real estate; his personal estate was insufficient, and the whole of the £2000 legacy given to his wife for life had to be provided out of real estate. The testator's widow elected to take the benefits given by the will in lieu of dower and freebench.

A question argued on further consideration was, from what time the testator's widow was entitled to interest on the £2000 legacy. It was admitted that the legacy of £1000 carried interest from the expiration of three months from the testator's death.

Cozens-Hardy, Q.C., and *Lyttelton Chubb*, for the Plaintiff, were stopped by the Judge.

Everitt, Q.C., and *A. J. Chitty*, for the Widow:—

There are three cases in which interest on a legacy runs from the death of the testator: *Theobald* on Wills (1)—(1.) Where the legatee is an infant and the testator *in loco parentis*; (2.) where the legatee is an infant and maintenance is given out of the legacy; (3.) where the legacy is in satisfaction of a debt of the testator: *Clark* v. *Sewell* (2). The legacy of the life interest in the £2000 and the other benefits are given in satisfaction of dower and freebench obligations on the testator's estate. The case is therefore within the third class of cases in which interest is allowed from the death of the testator. The reason for allowing the interest from the death is the stronger here, because it is only the income of the £2000 that is given, and that in satisfaction of an income running from the testator's death.

[*Cozens-Hardy*:—There is a case directly to the contrary: *Elton* v. *Montague* (3).]

In that case there was a period of three months fixed within

(1) 3rd Ed. 133.
(2) 3 Atk. 96.
(3) 1 L. J. (Ch.) (O.S.) 212.

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which the legacy was to be paid, implying that it was not to be paid before.

We admit that the fact that the legacy is to be paid out of the proceeds of land does not affect the question: *Turner* v. *Buck* (1).

Stokes, Whinney, and *Hadley,* for other parties.

NORTH, J.:—

I think it clear that interest runs from the end of the year after the testator's death. There is no personal estate to provide for the £2000, and it must come entirely out of the proceeds of the sales of the real estate. In the ordinary case the Court has said that a certain rule is to be adopted in the distribution of personal estate, namely, that legacies are to be paid within a year from the date of the testator's death, from which time an unpaid legacy will carry interest. It seems to me that the same rule ought to apply in this case, and the interest ought to commence to run after the expiration of that year. That seems to be directly in accordance with the case of *Elton* v. *Montague* (2), where there was a legacy of £5000 to the testator's widow, to be paid to her within three months after his death in lieu of jointure. It was held that, she having elected to take the legacy, was not entitled to interest between the testator's death and the three months when the legacy was directed to be paid. The Vice-Chancellor says: "The Court intends, that a testator means his widow to be provided for from the moment of his death, and therefore a legacy to her carries interest from that time. This, however, is a case, not of a simple legacy, but of election. The widow is provided for by her jointure; she is to make her election; and, in that election, the circumstance, that the legacy is not payable till three months after the testator's death, is one of the ingredients to be taken into the account." That decision seems to me to be precisely in point, and I must follow it.

It is to be remarked that the Vice-Chancellor took the view that in the case of an ordinary legacy to the widow she would have been entitled to interest from the date of the testator's

(1) Law Rep. 18 Eq. 301. (2) 1 L. J. (Ch.) (O.S.) 212.

death—a view that has since been held wrong. When it is remembered that he took that view, it makes the decision still stronger.

Solicitors for Plaintiff: *Thorneycroft & Willis.*
Solicitors for Widow: *Eldred & Bignold.*
Solicitors for other parties: *F. A. & A. C. Doyle; Blake & Heseltine.*

D. P.

In re MAY. CRAWFORD *v.* MAY.

[1890 M. 190.]

Married Women's Property Act, 1882 (45 & 46 *Vict. c.* 75), *s.* 3—*Judicature Act*, 1875 (38 & 39 *Vict. c.* 77), *s.* 10 [*Revised Ed. Statutes, vol. xvii. p.* 740]—*Executor—Retainer.*

A widow, the administratrix of her late husband, whose estate was insolvent, was allowed to retain out of assets come to her hands as administratrix the amount of a loan to him in his business out of her separate estate.

THIS was a creditor's action for the administration of the estate of *John Venables May*, who died intestate. The Defendant was his widow, his administratrix. The estate was insolvent. A summons by the Plaintiff for an order on the Defendant to pay into Court a balance in her hands was adjourned into Court and now heard.

The Defendant claimed to retain, out of the balance in her hands, a sum of £143 5*s.*, the amount of a loan advanced by her to her husband in February, 1885. The Defendant made an affidavit to the effect that the advance was made by the Defendant's handing to her husband the scrip for £200 Turkish bonds, her separate property, to be sold by him, the proceeds to be an advance by her to him to be repaid to her at the earliest opportunity; that the stock was sold by Messrs. *James Shepherd & Co.*, brokers, for £143 5*s.*; that the sum was paid to the intestate, and that there was in his cash-book, in use at that time in his business, in his handwriting, "the following entry at folio 125,

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viz., '*Shepherd, James,* £143 5*s.*,' and on the *contrà* side, folio 126, "1885, February 12th, banker's cheque, B. 27, £143 5*s.*'" The deceased had only one banking account.

Macnaghten, for the Plaintiff:—

The money, in respect of which the Defendant, the testator's widow, seeks to retain assets in her hands, was, in fact, advanced for and employed in his business. Moreover, the onus of proof lies on her to shew that it was not employed in his business: *In re Genese* (1).

Were this a case of bankruptcy, *Ex parte Taylor* (2), a case under *Bovill's Act,* shews that she would not be allowed even to prove till the ordinary creditors had been paid—that is to say, sect. 3 of the *Married Women's Property Act,* 1882, makes it a rule of bankruptcy that an ordinary debt has priority over the widow's debt, in respect of money employed in her late husband's business. Sect. 10 of the *Judicature Act,* 1875, incorporates that rule into this administration. The right of retainer does not exist against a debt which has priority over the debt to the person seeking to retain.

W. Baker, for the Defendant:—

The widow is seeking to exercise her common law right of retainer as administratrix—a right unknown in bankruptcy from the very nature of the case. There is no rule of bankruptcy as to retainer which can be introduced into the administration of the estate of a deceased person. And it has been so held: *Lee* v. *Nuttall* (3). Sect. 10 of the *Judicature Act* does not introduce all the rules of bankruptcy into the administration of an insolvent estate. That section was not passed to enlarge the estate; so that a rule of bankruptcy making void a bill of sale in certain cases was held not to be a rule introduced by that section into administrations: *In re Count D'Epineuil* (4).

[NORTH, J.:—There is no question here of enlarging the assets. The money lent is already part of the assets, and the question is whether the administratrix can get it back.]

(1) 16 Q. B. D. 700.
(2) 12 Ch. D. 366.
(3) 12 Ch. D. 61.
(4) 20 Ch. D. 217.

Lee v. *Nuttall* (1) shews that the fact that a right of retainer is annexed to a debt does not alter the character of the debt. This debt, therefore, is a simple contract debt, and although, if the widow were trying to prove her debt, sect. 3 of the *Married Women's Property Act* might apply, yet here she is not seeking to prove but claims to exercise her power of retainer.

Macnaghten, in reply :—

Lee v. *Nuttall* decided that an executor was not a secured creditor by reason of his having a right to retain. That does not affect the question whether the *Married Women's Property Act* postpones the debt of the widow. The rule of bankruptcy that makes the widow's debt inferior to the ordinary debts, it cannot be denied, is applicable to this administration; the right to retain does not exist against a superior debt.

NORTH, J. :—

I think this claim fails; it involves a nice point on the construction of the *Married Women's Property Act.* I think Mr. *Macnaghten* has not succeeded in bringing himself within sect. 3 of that Act. The case is very shortly this. A married woman lent money to her husband, who was a trader, which went into his business—for, I think, the entries in his book shew that it did go into his business. Then, in addition, there is the case of *In re Genese* (2), where Mr. Justice *Cave* held, that where a married woman sought to prove in the bankruptcy of her husband for money lent by her to him, she must shew that the money was not lent for the purpose of his trade; and therefore, even if the evidence as it stands were insufficient to shew that this money was lent for the purpose of the husband's business, the widow would have to prove that it was not advanced for the business, and she would have failed to discharge that *onus.* Therefore, the loan must be taken to have been for the husband's business.

That being so, the objection to the money being retained is that the widow would be postponed in bankruptcy under sect. 3 of the *Married Women's Property Act*, 1882. That section provides :

(1) 12 Ch. D. 61.

(2) 16 Q. B. D. 700.

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"Any money or other estate of the wife lent or entrusted by her to her husband for the purpose of any trade or business carried on by him, or otherwise, shall be treated as assets of her husband's estate in case of his bankruptcy, under reservation of the wife's claim to a dividend as a creditor for the amount or value of such money or other estate after, but not before, all claims of the other creditors of the husband for valuable consideration in money or money's worth have been satisfied." Now, I think it clear that this sum of £143 5*s.* is a debt, and is recognised as a debt by that section, because money advanced to a husband for trade is treated as a debt, subject to a reservation of the wife's claim to a dividend after claims of the other creditors for valuable consideration have been satisfied; therefore the section recognises the debt, though the time for payment is postponed. In the present case the husband did not become bankrupt; therefore the case referred to in that particular section has not happened. It is then said that the case is brought within the section by the operation of sect. 10 of the *Judicature Act*, 1875, which incorporates the rules of administration in bankruptcy into the administration of the insolvent estate of a deceased person; but it is putting it too high to say that all the rules in bankruptcy are incorporated into this administration. The *Judicature Act* does not incorporate the rules of bankruptcy into this administration for all purposes; it only says the rules of bankruptcy shall apply as to particular things, viz.: "As to the respective rights of secured and unsecured creditors, and as to debts and liabilities provable, and as to the valuation of annuities and future and contingent liabilities respectively." Now, what the widow claims to do is this: she is the legal personal representative of the deceased; she has got into her hands assets to a larger amount than the debt which is due to her; she is not seeking to prove for her debt, but is seeking to retain it out of the assets in her hands. That right she seeks to assert cannot be denied, unless she is precluded by the two sections to which I have referred. But a right of retainer is not affected by the *Judicature Act* at all, as was decided in the case of *Lee* v. *Nuttall* (1). It is said that the point decided there was that an

(1) 12 Ch. D. 61.

executor or administrator was not a secured creditor by reason of his having a right to retain. I do not think that was the only question decided. The decision went to the extent that the section did not apply to a right to retain. Lord Justice *James* said (1): "The sole object of the section, as it appears to me, was to get rid of the rule in Chancery under which a secured creditor could prove for the full amount of his debt and realize his security afterwards, and to put him on the same footing as in bankruptcy, where he was only entitled to prove for the balance after realizing or valuing his security. The section was never intended to apply to retainer by an executor."

The question I have to consider now is, not whether the widow is entitled to rank as creditor, as it would have been if the assets had been got in by a receiver, or in some other way so that the legal right to retain did not arise. She has a clear debt which she is not seeking to prove; but she is seeking to exercise her common law right to retain, which is not affected by the Acts. She is, in my opinion, entitled to retain the amount of her debt, and must pay in the balance only.

Solicitor for Plaintiff: *J. W. Smart.*
Solicitors for Defendant: *Buchanan & Rogers.*

(1) 12 Ch. D. 65.

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Aug. 1.

CURTIS *v.* KESTEVEN COUNTY COUNCIL.

[1890 C. 2256.]

Local Government Act, 1888 (51 & 52 *Vict. c.* 41), *s.* 11, *sub-ss.* 1, 6—*Main Road*—"*Vest*"—"*Roadside Wastes*"—*County Council.*

Strips of grass bordering the metalled part of a main road are "roadside wastes," within the meaning of sect. 11, sub-s. 1, of the *Local Government Act*, 1888. The herbage on such strips is not vested in the county council by virtue of sect. 11, sub-sect. 6, of that Act.

C. was tenant for life of the manor which included the waste land adjoining the highways in the parish of *S.* The metalled part of a main road through *S.* was bordered by strips of grass with some timber on them. The county council sold the grass by the sides of the main road to *T.* for a year. At the instance of *C.* and his tenants, an injunction was granted to restrain the county council from cutting and removing the grass, timber, and other growths from the sides of the main road.

THIS action related to the right to the herbage, gorse, and timber, and other growths, on the side of so much of the high road from *Newark* to *Lincoln* as lies in the parish and manor of *Swinderby*.

The road from *Newark* to *Lincoln*, of which the road in question forms part, was a turnpike road under a trust, which was continued up to the 1st of November, 1872, and then ceased under the statute of 35 & 36 Vict. c. 85. It therefore became a main road under sect. 13 of the *Highways and Locomotives* (*Amendment*) *Act*, 1878, and by sect. 11, sub-sect. 6, of the *Local Government Act*, 1888, became vested in and repairable by the County Council of the parts of *Kesteven*, division of *Lincolnshire*.

The length of road the subject of the action was 3746 yards. The metalled part of the road was of a uniform width of twenty-two feet. The total width of road including the waste on each side from hedge to hedge varied from a maximum of ninety-five feet to a minimum of sixty-five feet. The total area of the ground exclusive of the metalled part of the road was 13*a.* 34*p.*

By deed dated January, 1658, the "common and usual lanes" in *Swinderby* were assured on trust for the poor of the parish.

In 1876, the then trustees for the poor, in pursuance of an order of the Charity Commissioners, conveyed the waste land adjoining the highways in the parish of *Swinderby*, together with two small inclosures, to the late *Thomas Curtis*, who was also the lord of the manor of *Swinderby* and owner in fee of the inclosed land in the parish on each side of the road in question.

The first Plaintiff on the record was *Charles Constable Curtis*, the tenant for life under the will of *Thomas Curtis*, of the manor of *Swinderby* and the testator's other real estate in the parish of *Swinderby*. The practice of the Plaintiff is annually to let to some of the cottagers resident in the parish separately a right to graze cattle on the waste land by the side of the roads of the parish, each of such persons being allowed to depasture on the whole of the waste land.

The county council had sold to *John Langton* by auction, for 10*s.*, the herbage of the land by the side of the *Newark* and *Lincoln* roads for the period of a year.

The Plaintiffs were *Charles Constable Curtis* and two of the cottagers, to whom he had let a right of pasturage. The Defendants were the Council of the administrative county of the parts of *Kesteven*. The writ was indorsed with a claim for a declaration that the Plaintiff *Curtis*, was seised of the uninclosed lands or strips by the side of or adjacent to such portion of the highway formerly a turnpike road between the borough of *Newark* and city of *Lincoln*, as lie within the manor and parish of *Swinderby*, and was entitled to the pasture of herbage thereof and all trees and other growths thereupon; and an injunction to restrain the Defendants from wrongfully cutting or removing grass, trees, or other growths from the strips of land.

A motion was now made on behalf of the Plaintiffs for an interlocutory injunction. The motion was treated as the trial. The Defendant Council did not now assert a right to cut timber, further than at the Bar it was stated that they claimed the right to cut any timber that was an obstruction to the proper use of the land for the purpose of the road, but not the right to the proceeds of the timber.

It was admitted on the part of the Plaintiff that the public had a right of passing over the waste from hedge to hedge.

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Cozens-Hardy, Q.C., and *Ingle Joyce*, for the Plaintiffs:—

The Court will not put a construction on the Act that will take away a valuable property without giving compensation, if any other reasonable construction can be placed on the words of the Act. The vesting of the roads under sect. 11, sub-sect. 6, of the *Local Government Act*, 1888, in the county council does not vest the whole soil; it only vests such a part as is necessary for the purpose of the county council as the road authority: *Coverdale* v. *Charlton* (1).

The whole scope of sub-sect. 1 of sect. 11 of the *Local Government Act*, which throws the maintenance of main roads on the county council, shews that the county council is intended to be placed in the same position as the older highway authority was in with regard to their interest in the soil. With regard to "roadside wastes," such as the strips in question, the sub-section gives the county council the same powers as the highway board previously had for removing obstructions and asserting the right of the public to their use. That provision would be superfluous if the strips were vested in fee in the county council.

The words of sub-sect. 6 itself, the part of the Act on which the Defendants must rely, are not consistent with a construction that transfers by the force of the words "a main road shall vest" the property in everything on the whole width of the road to the county council; for, if such construction could be upheld, the vesting of the materials and drains would be unnecessary.

R. S. Wright (*Vernon Smith*, with him), for the Defendants:—

The road in question being a main road, the questions are, how far it extends laterally, and what is the meaning of the word "vest" in sub-sect. 6 of sect. 11 of the *Local Government Act*.

The road over which the rights of the public extend is not confined to the metalled part of, but, *primâ facie*, extends from hedge to hedge: *Elwood* v. *Bullock* (2); *Reg.* v. *United Kingdom Electric Telegraph Company* (3).

[*Cozens-Hardy*:—I admit that the public have a right of way over the whole width.]

(1) 4 Q. B. D. 104. (2) 6 Q. B. 383.
(3) 31 L. J. (M.C.) 166.

The question then is, what is the effect of the words "a main road shall vest in the county council"; the true construction is, that the whole width of the road including the right to herbage vests. We do not say that a greater depth of soil is vested than is required for the purpose of the council, nor is the right to the trees at present in dispute. Under the *Public Health Act*, 1875, s. 149, similar words were held to vest the right of herbage in an urban authority: *Coverdale* v. *Charlton* (1). [He also cited *Wandsworth Board of Works* v. *United Telephone Company* (2); *Rolls* v. *Vestry of St. George the Martyr, Southwark* (3).] The recent case of *In re Warminster Local Board* (4), shews that the duty of repairing not only the roadway but the whole width, including footpaths of main roads, is cast on the county council. In *Turner* v. *Ringwood Highway Board* (5), it was decided that, where a road of a certain width had been set out by inclosure commissioners, the highway authority could remove trees that had been allowed to grow up on the sides, though they had not the property in the trees.

[NORTH, J.:—The words of sub-sect. 1, giving the county council powers over the roadside wastes, seem useless on your construction of the Act.]

The words of the sub-section are redundant perhaps. They purport to give powers over bridges which are vested in the council otherwise. The words "roadside wastes" in the sub-section are requisite to provide for the cases of village greens and other wastes over which the public have rights that are not part of the highway.

NORTH, J.:—

I think this case turns on the construction of the *Local Government Act* itself. The question is whether an area of ground, some thirteen acres in extent, under this Act is vested for nothing in the county council; and whether a person who admittedly was the owner of the land until it was vested—if so vested—is to be deprived of it without compensation. I do not think this comes

(1) 4 Q. B. D. 104.
(2) 13 Q. B. D. 904.
(3) 14 Ch. D. 785.
(4) 25 Q. B. D. 450.
(5) Law Rep. 9 Eq. 418.

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within the meaning of sect. 11 of the Act of 1888. There it is provided by sub-sect. 1 that "every road in a county, which is for the time being a main road within the meaning of the *Highways and Locomotives (Amendment) Act*, 1878, inclusive of every bridge carrying such road, if repairable by the highway authority, shall, after the appointed day, be wholly maintained and repaired by the council of the county in which the road is situate"; and certain powers are given for the purpose. Then it says: "The county council shall have the same powers as a highway board for preventing and removing obstruction, and for asserting the right of the public to the use and enjoyment of the roadside wastes. And then the other material clause is sub-sect. 6 of s. 11, which is one dealing with the vesting. It says: "A main road and the materials thereof, and all drains belonging thereto, shall, except where the urban authority retain the powers and duties of maintaining and repairing such road, vest in the county council, and where any sewer or other drain is used for any purpose in connexion with the drainage of any main road, the county council shall continue to have the right of using such sewer or drain for such purpose." Looking at these two sub-sections, it seems to me they draw a clear and forcible distinction between what the Act calls a road and what the Act calls roadside wastes. It is suggested that "roadside wastes" have some meaning which the counsel for the county council confesses he does not know, and suggests that it may apply to village greens. I think that roadside wastes is an intelligible phrase; and under the Act what the county council have given to them is a power of asserting the right of the public to the use and enjoyment of these roadside wastes. That in itself seems to me inconsistent with the idea that this roadside waste was the property of the board itself; because, to say that absolute owners are to have power to assert the right of the public to the use and enjoyment of their property, seems to me something requiring an explanation that has not been given. I do not think the roadside wastes are vested by this Act. *In re Warminster Local Board* (1) is a decision upon this very section, and I need hardly say that if I thought it governed this case I should

(1) 25 Q. B. D. 450.

follow it, whatever view I might have taken of the section independent of that case. But I do not think it really governs the case at all, because what was being dealt with there was the question who was to keep up the footways, and it was held—and I should have held, if it had been a new case—that the footways were part of the road, i.e., that the part of the road most convenient for foot-passengers was as much part of the road as the other part which can be used by horses and carriages. I should have thought it clear that the footways were part of the road. But it does not go any further, excepting that there is an observation by Mr. Justice *Charles*, where he says the whole of the expense of maintenance of the main roads—that is to say, main roads from hedge to hedge, including the footpaths—is thrown on the county authorities. The case before the Court was a sole question as to a footway forming part of a street within the control of an urban authority, and, although, no doubt, Mr. Justice *Charles* uses that phrase, "road from hedge to hedge," he could not have had in his mind what I have to deal with now—a large area of ground outside the footpath altogether. Under these circumstances, I come to the conclusion that these roadside wastes—as I hold them to be—are not vested in the county council, and that the Plaintiffs are entitled to the relief they ask for.

Cozens-Hardy:—Then an injunction will go to restrain the Defendants from cutting and removing the grass, timber, and other growths by the side of the main road "wrongfully"; the word "wrongfully" is added to protect the rights of the county council as the highway authority.

R. S. Wright:—We should prefer to have the words "without prejudice to the rights of the county council under the *Local Government Act*" instead of "wrongfully."

NORTH, J.:—

Then that will be so.

Solicitor for the Plaintiffs: *C. D. Woolley.*
Solicitors for the Defendants: *Peacock & Goddard.*

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July 24; *Aug.* 2.

BELCHER *v.* WILLIAMS.

[1886 B. 6020.]

Practice—Costs—Partition Action—Incumbered Shares—Discretion of Court—Partition Act, 1868 (31 & 32 *Vict. c.* 40), *s.* 10 [*Revised Ed. Statutes, vol. xv., p.* 697].

Under sect. 10 of the *Partition Act*, 1868, the Court has an absolute discretion as to the costs of a partition action up to the trial; but as a general rule it will order those costs to be borne by the whole estate—that is, by each share in proportion to its value, the shares for this purpose being ascertained at the date of the Chief Clerk's certificate.

The Plaintiffs in a partition action were entitled to a moiety of the estate, subject to some mortgages. The Defendants were entitled to the other moiety, upon which there was no mortgage. The estate having been sold:—

Held, that the costs of all parties, including those of the mortgagees, must be paid first out of the proceeds of sale.

There is no fixed rule in partition actions (as there is in administration actions) that only one set of costs will be allowed in respect of each share of the property.

The authorities as to the costs of a partition action reviewed.

FURTHER consideration of a partition action.

The only important question for the decision of the Court was, how the costs of the action were to be borne.

The property in question had belonged to *Elizabeth Roche*, who by her will, dated the 12th of December, 1857, bequeathed all her real and personal estate to her three children, *Elizabeth Roche*, *Isabella Roche*, and *Alexander Roche*, in equal shares. And the testatrix directed that, if it should become necessary to sell her real estate in order to make a division of her estate, her real estate and leasehold interests should be sold by the trustees or trustee for the time being of her will, and the proceeds invested in manner therein mentioned in the names of the trustees or trustee. And she directed that the shares or portions of her daughters should be held by her trustees or trustee in trust for their separate use. And she also empowered her daughters respectively by any writing, whether testamentary or otherwise, to appoint and dispose of their respective shares or portions to

any person or persons and in any manner they respectively might think proper.

The testatrix died on the 14th of December, 1857. *Elizabeth Roche* (the daughter) married *Henry Froom*, and on the 12th of June, 1867, she executed a deed-poll, appointing all her one-third share under her mother's will to her husband absolutely. *Isabella Roche* married *A. H. Williams*, and she and her husband were the Defendants to this action. *Alexander Roche* died on the 10th of July, 1877, having by his will devised and bequeathed his real and personal estate to his sisters *Elizabeth Froom* and *Isabella Williams* in equal shares.

The Plaintiffs in the action had become the owners of a moiety of the property, as to one-third thereof absolutely, and as to the remaining two-thirds subject to certain mortgages.

The action was commenced in 1886. The ordinary judgment for partition was given on the 2nd of April, 1887. The Chief Clerk made his certificate on the 8th of August, 1889. The whole property was afterwards sold, and the proceeds of sale were paid into Court.

The persons entitled to the property as found by the certificate were as follows: The Defendant *Isabella Williams* was absolutely entitled to two-sixths. The Defendant *A. H. Williams*, in right of his wife, was entitled to one-sixth. The Plaintiffs were absolutely entitled to one-sixth, and they were entitled to the equity of redemption of the remaining two-sixths. These two-sixths were subject to a first mortgage to the Plaintiffs to secure £519; and to a second mortgage for £2000, of which sum one half was due to *H. Wilkinson*, as the personal representative of *A. Froom*, deceased; and the other half was sub-mortgaged to *M. Simpson* as security for £1168. Subject to that sub-mortgage, this half of the £2000 belonged to *F. Froom*.

The question was, whether all the parties to the action, either as Plaintiffs or Defendants, or as served with notice of the judgment, were entitled to be paid their costs out of the money in Court, or whether only one set of costs should be allowed to the owner of a share and his mortgagees, as in an administration action. The mortgagees were served with the judgment.

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Cozens-Hardy, Q.C., and *Oswald*, for the Plaintiffs.

Stewart Smith, for the Defendants:—

The costs of the incumbrancers on the Plaintiffs' moiety ought to be borne by that moiety, and not to be paid first out of the whole fund: *Jennings* v. *Foster* (1). The incumbrances were created after the death of the testatrix.

Yate Lee, for the mortgagees, *Wilkinson & Simpson*.

Pochin, for the surviving trustee of the will.

Cozens-Hardy, in reply:—

The usual practice now is to give the costs of all parties to a partition action out of the estate. I am not aware of any case in which the rule in administration actions, viz., that only one set of costs will be allowed in respect of each share of the estate, has been applied to partition actions. The Defendants have had the benefit of the title to the property being proved.

NORTH, J.:—I will consider the point, whether the incumbrancers ought to be allowed costs as well as their mortgagors.

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This is the further consideration of a partition action, in which the usual judgment was given. The certificate was made in August, 1889, and it finds that the title to the property stands thus: As to two-sixths the Defendant *Isabella Williams* is absolutely entitled, and as to one-sixth her husband is entitled in her right. Another sixth belongs to the Plaintiffs absolutely, and as to the remaining two-sixths the first claim is a charge in favour of the Plaintiffs, and the second claim upon it is a charge of £2000, of which one moiety is due to a Mr. *Wilkinson*, as the legal personal representative of *Alfred Froom*. The other half of the £2000 is sub-mortgaged to a Mr. *Simpson*, and, subject thereto, that moiety of the £2000 belongs to *Frederick Froom*. Subject to these two charges, the equity of redemption in these two-sixths belongs to the Plaintiffs.

(1) W. N. (1884), p. 200.

Every question is settled except the question of costs, as to which a point is now raised by reason of the charges upon the two-sixths which I have last mentioned. The mortgagees are necessary parties to the action, and they are here.

Now the rule as to costs in partition suits in the Court of Chancery used to be very well settled. No costs were given up to the hearing. Then the costs of effecting the partition (*i.e.*, the costs of the commission, according to the practice at that time) were borne by the parties in proportion to their respective interests, which is the same thing as saying, that, if the estate were sold, the costs were to be paid out of the proceeds of sale in the first place. No costs were given of any proceedings subsequent to the commission. By the *Partition Act* of 1868 the practice was changed. Sect. 10 of that Act provides, that "in a suit for partition the Court may make such order as it thinks just as to costs up to the time of the hearing," and there are many cases which shew that under that Act the Court has now a general discretion as to the costs, as it probably has also under the General Orders.

With regard to the way in which that discretion has been exercised, the usual practice seems to me beyond all dispute to have been to give the costs of all parties out of the estate. That was done by Vice-Chancellor *Malins* soon after the Act was passed in *Osborn* v. *Osborn* (1); by Lord *Romilly*, M.R., in *Miller* v. *Marriott* (2); by Vice-Chancellor *Malins* in *Leach* v. *Westall* (3); by Lord *Romilly*, M.R., again in *Cannon* v. *Johnson* (4); by Lord *Selborne* in *Simpson* v. *Ritchie* (5); and by Sir *George Jessel*, M.R., in *Ball* v. *Kemp-Welch* (6). I have not attempted to trace the practice any further, and I am not sure whether I could have done so. The practice appears to have become settled, and probably the point was not brought before the Courts afterwards. In *Simpson* v. *Ritchie* Lord *Selborne*, L.C., who was then sitting for the Master of the Rolls (7), said: "Having regard to the 10th section of the *Partition Act*, 1868, it cannot be said that the Court is bound by the old rule as to the

(1) Law Rep. 6 Eq. 338.
(2) Ibid. 7 Eq. 1.
(3) 17 W. R. 313.
(4) Law Rep. 11 Eq. 90.
(5) Ibid. 16 Eq. 103.
(6) 14 Ch. D. 512.
(7) Law Rep. 16 Eq. 104.

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costs of partition suits. It is impossible to lay down a general rule on the subject; and there may be cases in which the Court, in the exercise of its discretion, will follow the old practice; but in this case I think the costs ought to be paid out of the estate." That, as I have said, is, I think, the general rule, though there are certain exceptions to it. In *Landell* v. *Baker* (1), Lord *Romilly*, M.R., required each of the parties to pay his own costs up to the hearing, thus following the old practice. That was soon after the Act was passed; but in the later case of *Miller* v. *Marriott* (2), he preferred to follow the decision of Vice-Chancellor *Malins* in *Osborn* v. *Osborn* (3). In two other cases—*Wilkinson* v. *Joberns* (4), before Lord *Selborne*, and *Porter* v. *Lopes* (5), before Sir *George Jessel*—no costs were given up to the trial; but both those cases depended on special circumstances, and in each of them the general rule was recognised to be that which I have stated.

To this rule there is, I think, one clearly established exception. Whenever, with respect to any share, there are, what I may call, costs of adverse litigation between the parties interested in that share—adverse claimants to the share, for instance—those costs are, at any rate to some extent, to be borne by that share and not by the estate generally; and I think it is only fair that this should be so. In *Jennings* v. *Foster* (6), before Mr. Justice *Pearson*, there was a dispute as to the title to one share, and the question was raised by a summons, and the note says that Mr. Justice *Pearson* directed the costs of that application to be paid out of the moiety of the purchase-money which represented that share. I am not quite satisfied whether the report is to be fully relied on. That the learned Judge directed some costs to be borne by the particular share I have not the least doubt; but I doubt whether he directed all the costs of both parties to be borne by that share. In all probability what he really did was, to direct that the costs, so far as they had been increased by the adverse litigation, should come out of the particular share. And that is exactly what Sir *George Jessel* did

(1) Law Rep. 6 Eq. 268.
(2) Ibid. 7 Eq. 1.
(3) Ibid. 6 Eq. 338.
(4) Law Rep. 16 Eq. 14.
(5) 7 Ch. D. 358.
(6) W. N. (1884), p. 200.

in *Mildmay* v. *Quicke* (1). In that case one share had belonged to a married lady, Mrs. *Quicke*, and there was a contest who was entitled to her share, and she and her husband had appeared separately. She died pending the action, leaving two infant daughters. The question was argued and decided, whether the proceeds of the share were personalty which went to the husband, or realty which went to the co-heiresses, and the Master of the Rolls said (2): "The costs occasioned by the order for revivor, and by bringing the infant defendants before the Court, and of their appearance, will be part of the defendants' costs in the cause; but as against the plaintiff the costs occasioned by the severance in the defence of Mr. and Mrs. *Quicke* must, of course, be borne by her share." If I may venture to say so, I think that was strictly right, meaning by "the costs occasioned by the severance," not the costs of both parties so far as related to that question, but the extra costs occasioned by the severance of two defendants who otherwise would have been acting together, but who had to appear separately because the dispute was raised. These are two illustrations of an exception to the general rule. Again, I have no doubt that, if trustees severed, the Court would not allow them two sets of costs. But, subject to these exceptions, it appears to me that the costs of each party, by which I mean the costs of each share, ought to be borne by the estate as a general rule.

Then the question arises, what is a "share"? Suppose a testator died fifty years ago, leaving his property to *A.* and *B.* in equal moieties, and that during that time one of the moieties had remained in the hands of one person, while the other had become subdivided into a great many shares—a very common case in a partition action. In such a case I think the shares ought to be taken to be as they are ascertained at the time when the Chief Clerk's certificate is made, finding who are the persons interested in the property. I can see no reason why, simply because fifty years ago the property happened to go in moieties, all the costs in connection with the shares afterwards coming into existence should be measured by the original devolution. I think, therefore, that a "share" means the share of a person

(1) 46 L. J. (Ch.) 667. (2) 46 L. J. (Ch.) 669.

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found to be entitled to a share by the certificate. I have looked into the cases a good deal myself, and I have asked two of the Registrars whether they could throw any light upon the matter from their books, and I have been unable to find any case, nor have I heard of any case, in any way inconsistent with this view. And there seems to me to be a strong reason in its favour, and it is this—in a partition suit the Act gives to the owners of a moiety of the estate the right to say whether it shall be changed from land into money by a sale. For that purpose it is settled that all the persons interested must be before the Court—the Court cannot get on without them. Before the *Partition Act* of 1876 was passed several partition actions had been tied up, because there was no power to proceed without all the parties interested being served, and some parties were missing or could not be served. Under the Act of 1876 the Court has now power to dispense in particular cases with service of notice of the judgment on any person or class of persons interested. But it seems to me a reason for giving each person interested costs, that you cannot get on without him; and it does not appear to me fair that persons, who are brought before the Court for the purpose of giving other parties interested their legal rights, should have to bear the costs so occasioned. And I find in *Mildmay* v. *Quicke* (1) not exactly a decision to that effect, but an observation strongly tending that way. In that case Messrs. *Torr & Co.*, Mrs. *Quicke's* solicitors, had obtained a charging order for their costs upon the fund, and a stop order; and they asked to have their costs out of the fund. Sir *G. Jessel* said: "As to the appearance of Messrs. *Torr & Co.*, their having a charging order does not make them parties to the cause or entitle them to appear, except at their own expense. They must bear their own costs of obtaining the stop order, and of appearance by counsel." By virtue of their charging order they were incumbrancers on the fund; but the reason assigned for not giving them costs is, that they were not parties to the cause or entitled to appear; and I gather from that that, if they had been either the one or the other, the Master of the Rolls would have held that they were entitled to their costs.

(1) 46 L. J. (Ch.) 667, 669.

The question still remains with regard to incumbrancers, whether there is any difference between a subdivision of a share among persons who take absolutely, and the subdivision of a share, so to say, within itself, an incumbrance or incumbrances being created upon it, subject to which the original owner is entitled to the equity of redemption. Does the latter case stand in any different position as to costs? I think it does not. Of course, there may be in that case, as in the other, disputes relating only to the share itself. If, for instance, there was a dispute as to the amount due on a mortgage, or as to the priorities of mortgages, it might well be said that the costs of such a dispute ought to come out of the particular share. But those would be exceptional cases, and not governed by the ordinary rule; and, in the absence of such special circumstances, I can see no reason why the incumbrancer should not have his costs out of the estate, as well as the person whose share is incumbered. I can see no reason why, because a man has mortgaged his share, he should fare worse as to costs than if he had not done so, when partition is sought by the owner of another share. This also should be borne in mind. Suppose the owner of a share wishes to raise money by means of it. If he does so by dividing it into two and selling half of it, the assignee of the moiety sold must, of course, be served, for he is entitled to a share, and he would get his costs; and I cannot see any reason in principle why the costs should be treated differently if the owner of a share chooses to split it by means of a mortgage into what I may call a preferred part and a deferred part, rather than to split it into two parts, one of which he retains and the other he sells. Moreover, I have been unable to find any case—and the Registrars whom I have consulted cannot find any note of a case—in which where shares have been incumbered one set of costs only of proceedings for partition has been allowed in respect of an incumbered share. Nor can I find any case in which a mortgagee has been ordered to add his costs to his security (which would not be exactly the same thing, but would be somewhat like it), except in *Wilkinson* v. *Joberns* (1), before Lord *Selborne*. That is the only case in which I can find that that course was adopted. There

(1) Law Rep. 16 Eq. 14.

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was a very good reason for it. By reason of the special circumstances of the case Lord *Selborne* thought it right to direct that the costs of the parties up to the hearing should not be borne by the estate, but that each party should bear his own costs; and, that being so, it followed, of course, as between a mortgagor and the mortgagee of his share, that the mortgagee would add his costs to his security. The only difficulty is the existence of the recognised rule in administration actions, which is often spoken of as the rule in *Greedy* v. *Lavender* (1), that only one set of costs shall be given in respect of each share. But, in answer to that, I say, that I can find no trace of that course having been adopted in partition suits, and there are very many cases in which it has not—that is, cases in which the parties have had their costs allowed, without any direction being given that they were to be limited to one set in respect of any particular share. In my opinion, also, such a limitation would work injustice.

I think, therefore, that in the present case the incumbrancers must be treated as if they were owners of a share, and must have their costs out of the fund. I am not, however, attempting to lay down any absolutely fixed general rule. It is quite clear, as I have already said, that the Court has a discretion as to costs, which it will exercise differently under different circumstances. In the present case, I think, the incumbrancers must be treated as owners of shares, and have their costs accordingly. Such a rule might, no doubt, work rather hardly in some cases; but the Court is strong enough to exercise its discretion so as that the costs shall be borne in the fairest way possible, having regard to the circumstances of each particular case.

Solicitors: *J. G. Shearman; Street & Poynder; Vertue; J. G. Shearman, Jun.*

(1) 11 Beav. 417.

W. L. C.

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Nov. 13, 14, 18, 19, 20, 21, 25, 26, 27, 28; *Dec.* 2, 3, 4, 5, 10, 11, 12, 16, 17;

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Aug. 5.

[1888 B. 3394.]

[1889 R. 486.]

Trade-mark—Registration—Rectification of Register—"Person Aggrieved"—Expiration of Five Years since Registration—Part of Trade-mark in Common Use—Application to register Mark—Disclaimer—Patents, Designs, and Trade Marks Act, 1883 (46 & 47 *Vict. c.* 57), *ss.* 64, 74, 76, 90—*Trade Marks Registration Act*, 1875 (38 & 39 *Vict. c.* 91), *ss.* 3, 5, 10.

The Plaintiffs in 1877 registered as a "new" trade-mark the device of a lighthouse on a rock, inclosed in two concentric circles. The two circles were in fact common to the trade in which the Plaintiffs were engaged. In 1888 the Plaintiffs registered a label, on which was printed (*inter alia*) their trade-mark. In their application for this registration they stated that they had used the label for upwards of ten years before August, 1875. This statement was in fact untrue, inasmuch as they had not used the trade-mark till 1877, and they had not used the rest of the label before 1870. In the opinion of the Court the misstatement was not made fraudulently, but through carelessness.

In 1888 the Plaintiffs brought an action against the Defendants (who were engaged in the same trade) for infringement of both the trade-mark and the label. The Defendants then moved to expunge both registrations:—

Held (as to the trade-mark), that, by reason of the circles being in common use in the trade, the lighthouse with the circles ought never to have been registered, and that, therefore, the lapse of five years since the registration was not, under sect. 76 of the *Trade Marks Act* of 1883, a bar to the Defendants' application:—

Held, also, that, by reason of the action for infringement, the Defendants, who were registered in one of the classes in which the Plaintiffs were registered, were as to that class "persons aggrieved" by the Plaintiffs' registration, and that the register must as to that class be rectified by adding a note, that so much of the Plaintiffs' mark as consisted of the device of two circles was common to the trade:

Held (as to the label), that the registration must be expunged, on the ground that it had been obtained by means of material misrepresentation.

The Defendants in 1877 registered as a trade-mark a device called a "winged cross." In practice they surrounded the mark with two concentric circles, like those which the Plaintiffs used; but they did not register the circles, because they were common to the trade. In 1888 the Defendants applied for the registration of the winged cross, surrounded by the circles, with a disclaimer of any exclusive right to the circles. The

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Plaintiffs opposed the registration, on the ground that the mark so nearly resembled their own as to be calculated to deceive:—

Held, that the registration could not be allowed.

TRIAL of action to restrain the infringement by the Defendants of two registered trade-marks of the Plaintiffs, and the imitation of their labels. There were heard at the same time a motion by the Defendants to expunge the registration of the Plaintiff's trade-marks, and a summons by the Defendants asking that the Registrar might be directed to proceed with the registration of a trade-mark of theirs.

The Plaintiffs, *John Baker & Sons*, carried on business at *Sheffield*, as manufacturers of steel files and hardware goods. The Defendants, *Rawson Brothers*, carried on a similar business, also at *Sheffield*. Both firms had a large export trade to *India*. By the action of *Baker* v. *Rawson*, the writ in which was issued on the 5th of July, 1888, the Plaintiffs claimed an injunction to restrain the Defendants from infringing two registered trade-marks of the Plaintiffs, No. 7883 and No. 1285 S., or either of them, and from selling or offering for sale any hardware goods not manufactured by the Plaintiffs stamped in such a way, or to which should be affixed or applied labels or wrappers of such a pattern, as to lead to the belief that those goods were of the Plaintiffs' manufacture. The Plaintiffs also claimed an account of profits.

The trade-mark No. 7883 was registered under the *Trade Marks Registration Act*, 1875, on the 29th of May, 1877, in respect of Classes 5, 7, and 12. The registration in Class 5 was for "steel," in Class 7 for "reaping and chaff knives, being parts of agricultural machines," and in Class 12 for "files."

The application for registration was made on the 3rd of July, 1876, as for a "new mark"—that is, a mark not used before the 13th of August, 1875.

The mark consisted of a lighthouse on a rock, surrounded by waves, inclosed in two thin concentric circles, there being in the space between the circles, at the upper part, the letters "*J. B. & S.*" (meaning *John Baker & Sons*), and at the lower part the date "1837," that being the date at which the Plaintiffs' firm was established. In the first instance, when the Plaintiffs

made their application for registration, the lighthouse had the word "firm" beneath it, but the Registrar declined to register that word.

The second mark, No. 1285 S., consisted of a label upon which (*inter alia*) the other trade-mark was printed. The application for its registration was made on the 27th of April, 1887, for registration in Class 12, in respect of cutlery and edge tools, including files and saws. The Applicants stated in their application that they had used the mark in respect of those goods for upwards of ten years before the 13th of August, 1875. This statement was in fact untrue, though, as *North*, J., held, it was not made fraudulently, but only through great carelessness. The registration was made on the 23rd of February, 1888.

The Defendants by their defence alleged that the Plaintiffs were not entitled to be registered for the mark No. 7883, because the device of two circles was common to the trade in the goods in respect of which the registration was made. The Defendants also alleged that the registration of the other mark was invalid, because it had been obtained by means of the untrue statement that the mark had been used for upwards of ten years before the 13th of August, 1875.

The Defendants offered to undertake not in the future to use the letters "*R. B. S.*" and the figures "1877" between the two circles when surrounding their trade-mark, though they did not admit that they were not entitled to use those letters and figures as they had been using them.

The Defendants applied by motion, asking that the register might be rectified by expunging therefrom the mark No. 7883, or so much thereof as consisted of the device of two circles, or by adding a note that that device was common to the trade, and also that the register might be rectified by expunging therefrom the mark 1285 S., on the ground above mentioned.

The Defendants had used as a trade-mark the device of a cross between two wings, called a "winged cross." This mark had been granted to them on the 14th of October, 1870, as a *Sheffield* corporate mark. On the 4th of March, 1876, they applied for the registration of this mark for Class 12 (cutlery, knives, scissors, razors, chisels, plane-irons, hatchets, files, saws), and on the 30th

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of January, 1877, the mark was registered. The Defendants had in practice surrounded this mark with two concentric circles, like those used by the Plaintiffs; but they did not then apply for the registration of the circles, because that device was common to the trade. The Defendants had placed between the circles the letters "*R. B. S.*" (which were said to mean "*Rawson Brothers, Sheffield*"), and the figures "1877," that being the date of the foundation of their firm. These letters and the date were placed between the circles in positions similar to those in which the Plaintiffs' letters and date were placed between their circles.

On the 1st of March, 1888, the Defendants applied for the registration in Class 12 (cutlery, edge-tools, and skates), of the winged cross surrounded by the two circles, stating that they and their predecessors in business had used the mark since 1870. On the 14th of November, 1888, the application was advertised; and on the 30th of November, the Defendants applied for leave to correct a clerical error by adding a disclaimer of any exclusive right to the circles. On the 17th of January, 1889, the Plaintiffs gave notice of opposition to the registration, on the ground that the mark so nearly resembled their mark as to be calculated to deceive. The Defendants took out a summons, asking that the Registrar might be directed to proceed with the registration.

The labels used by the Defendants were said by the Plaintiffs to be so like theirs as to be calculated to deceive. No case of actual deception was proved.

Cozens-Hardy, Q.C., and *Hatfield Green*, for the Plaintiffs:—

As to the Plaintiffs' trade-mark which was registered in 1877, sect. 76 of the *Trade Marks Act* of 1883, inasmuch as the mark has been on the register for more than five years, makes the registration conclusive evidence of the Plaintiffs' right to the exclusive use of the trade-mark; and by sect. 75 registration is to be deemed to be equivalent to the public use of the trade-mark. If this trade-mark had been merely descriptive of the goods to which it is applied, so that it ought not from its nature to have been ever registered at all, no doubt the lapse of five years would not have been conclusive as to the Plaintiffs' title to it, and it would be removed from the register: *In re J. B. Palmer's*

Application (1); *In re Leonard & Ellis's Trade-mark* (2); *Edwards* v. *Dennis* (3). But the present case does not fall within the principle of those decisions.

As to the registered label, the Defendants ask that it may be removed from the register on the ground that there was a misstatement in the application for registration. The misstatement was clearly an innocent one; on the face of it it was erroneous, and it cannot affect the question whether the label ought to have been registered.

With regard to the infringement of the trade-mark, it is essential to consider the way in which the mark is used—the effect which the mark produces when the goods come into the hands of the ultimate consumer: *In re Rosing's Application* (4). The principal market for the Plaintiffs' goods is in *India*, and the question is, whether the native consumer there will be deceived by the Defendants' mark. The consumer does not see the two marks together; he has only a recollection, more or less distinct, of the mark which he has been in the habit of seeing. The question is, whether there is such a general similarity between the two marks as is calculated to deceive.

But, even if the Defendants are right in their contention that the Plaintiffs' mark is bad as a trade-mark, and that it ought to be struck off the register, the Plaintiffs are entitled to an injunction, on the ground that the Defendants are, by the general similarity of their labels, passing off their goods as the Plaintiffs': *Mitchell v. Henry* (5); *Jay* v. *Ladler* (6).

[NORTH, J., referred to *Thompson* v. *Montgomery* (7).]

Napier Higgins, Q.C., *Moulton*, Q.C., and *J. Cutler*, for the Defendants:—

It is said that the Defendants' motion to rectify the register is too late; that, by virtue of sect. 3 (8) of the Act of 1875, or

(1) 21 Ch. D. 47.
(2) 26 Ch. D. 288.
(3) 30 Ch. D. 454.
(4) 54 L. J. (Ch.) 975, 976.
(5) 15 Ch. D. 181, 193.
(6) 40 Ch. D. 649.
(7) 41 Ch. D. 35.

(8) Sect. 3. "The registration of a person as first proprietor of a trade-mark shall be *primâ facie* evidence of his right to the exclusive use of such trade-mark, and shall, after the expiration of five years from the date of such registration, be conclusive

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sect. 76 of the Act of 1883, the lapse of five years since the registration of the Plaintiffs' trade-mark is conclusive as to its validity.

But, the concentric circles being in common use in the trade, the Act did not authorize their registration as a trade-mark; and therefore those sections do not make the lapse of time a bar to an application to rectify the register; *In re J. B. Palmer's Application* (1); *In re Leonard & Ellis's Trade-mark* (2). The principle of those decisions is not limited to that which by its nature could not legally constitute a trade-mark; it extends to a device which could not legally be registered as a trade-mark by reason of its being in common use. Other decisions bearing on the point are—*In re Wood's Trade-mark* (3); *Edwards* v. *Dennis* (4); *In re Wragg's Trade-mark* (5).

At the date of registration the mark was not entitled to be registered, for it was not distinctive. A man cannot take a number of common things and then add to them some distinctive device and register the whole as a trade-mark. Sect. 10 of the Act of 1875 differs materially from the corresponding sect. 64 of the Act of 1883. Sect. 10 says that a trade-mark "consists of" one or more of certain specified "essential particulars," among which is "a distinctive device"; while sect. 64 says that a trade-mark "must consist of or contain at least one of" the "essential particulars" there mentioned, among which is "a distinctive device." The reason for this difference is, that the Act of 1883 provides by sect. 74 for the disclaimer of the right to the exclusive use of any particular common to the trade which is in pursuance of that section registered as an addition to a trade-mark. A distinctive device common to the trade cannot

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evidence of his right to the exclusive use of such trade-mark, subject to the provisions of this Act as to its connection with the goodwill of a business."

Sect. 76. "The registration of a person as proprietor of a trade-mark shall be *primâ facie* evidence of his right to the exclusive use of the trade-mark, and shall, after the expiration of five years from the date of registration, be conclusive evidence of his right to the exclusive use of the trade-mark, subject to the provisions of this Act."

(1) 21 Ch. D. 47.
(2) 26 Ch. D. 288.
(3) 32 Ch. D. 247.
(4) 30 Ch. D. 454.
(5) 29 Ch. D. 551.

be registered as an addition to a trade-mark, except when the mark was used before August, 1875. The Plaintiffs' mark, by reason of the circles being in common use, was not distinctive, and was, therefore, not entitled to registration. If what could otherwise be distinctive is overshadowed or so modified by a common element as not to be distinctive, there is no distinctive device. The Plaintiffs, therefore, are placed in this dilemma; either their mark is, as we say, a mark that ought not to have been registered, or our mark with the circles added is no infringement of theirs.

It is not sufficient to support the Plaintiffs' marks as distinctive for them to shew that they are distinguishable: *In re Hudson's Trade-marks* (1).

Even if the Plaintiffs were entitled to registration, it could only be on the footing of their not claiming any exclusive right to the circles as a trade-mark.

As to the Plaintiffs' label registered in 1888, the registration is invalid, because it was founded on an untrue representation of a material character—that the trade-mark was an old one. Such a misrepresentation prevented the Registrar from properly exercising his judicial functions.

The evidence does not prove that the Defendants have been passing off their goods as the Plaintiffs'. There is no proof of actual deception, and it is not proved that the Defendants have done anything which is calculated to deceive. It is not necessary that there should be such a difference between the two marks that it is utterly impossible that any one should be deceived; *Leather Cloth Company* v. *American Leather Cloth Company* (2); *In re Lyndon's Trade-mark* (3). The question is, whether the mark when fairly used is calculated to deceive a person of ordinary intelligence. If the Plaintiffs have adopted a device which is common to the trade, they cannot complain of any deception resulting from the use by the Defendants of the same device which they are fully entitled to use.

As to the Defendants' application for directions to proceed with the registration of their mark, they are clearly entitled to

(1) 32 Ch. D. 311. (2) 11 H. L. C. 523.
(3) 32 Ch. D. 109.

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the winged cross as a trade-mark, and they may add to it the common element of two circles. The Court will allow a note of disclaimer of the exclusive right to the circles to be now added.

Cozens-Hardy, in reply:—

As to the Defendants' motion for directions to proceed, it cannot be granted, because there was no disclaimer of the two circles in the application for registration; *In re Goodall's Trade-mark* (1). The application is also bad because it seeks to have registered only a part of that which the Defendants were actually using: *In re Spencer's Trade-marks* (2).

As to the motion to strike out the Plaintiffs' trade-mark, it must at any rate be limited to Class 12, because the Defendants are only registered in that class.

But the Defendants come too late, for it is clear that they have known of the mark since 1881. This is a fatal objection.

Even if the Defendants did not know of the mark till 1888, they are too late, for sect. 76 of the Act of 1883 makes the lapse of five years a bar. Sect. 90 of the Act of 1883 differs materially from sect. 5 of the Act of 1875. Sect. 5 empowers the Court to rectify the register (*inter alia*), "if any mark is registered as a trade-mark which is not authorized to be so registered under this Act." There are no such words in sect. 90 of the Act of 1883, and the cases relied on as shewing that the lapse of five years is not a bar (with the exception of *In re Wragg's Trade-mark* (3)), were decided under the Act of 1875. The Act of 1875 is repealed by sect. 113 of the Act of 1883.

Sect. 90 of the later Act contains no reference to an original defect in the mark itself. Sect. 75 of the Act of 1883 makes registration equivalent to user. This was not so in the Act of 1875. The distinction between sect. 5 and sect. 90 was not pointed out in *In re Wragg's Trade-mark*, and, moreover, there the two marks on the register were exactly similar.

Moreover the cases relied upon were cases of descriptive words, not of a device.

The Plaintiffs' mark as a whole being a device, it is immaterial

(1) 42 Ch. D. 506. (2) 3 Rep. Pat. Cas. 73.
(3) 29 Ch. D. 551.

that some part of it has been used by other persons. The question is, whether the device was a "distinctive device" within the meaning of sect. 10 of the Act of 1875.

As to the motion to take the registered label off the register, the error as to the date of user of the trade-mark was an innocent one, and it was not material. There is no evidence that any one was by the mistake prevented from objecting to the registration. The Act does not impose any penalty for such an error. *Orr-Ewing* v. *Registrar of Trade Marks* (1) does not apply. That was not an application to rectify the register, but a motion for directions to the Registrar to proceed with an application for registration, and the case was remitted to the Registrar, the matter being left entirely open to him to deal with it as he might think right. In *In re Price's Patent Candle Company* (2), the label was not distinctive as ours is.

As to the action for infringement, if the Plaintiffs' trade-mark is not removed from the register they are clearly entitled to an injunction, for there is plainly an infringement by the Defendants. And, even if the trade-mark is taken off the register, the Plaintiffs are entitled to an injunction on the ground of deception. It is not necessary to prove actual deception: *Johnston* v. *Orr-Ewing* (3). Nor is it necessary to prove that there is a probability of retail traders being deceived by wholesale dealers. The question is, whether the retail dealer will be enabled to deceive the ultimate purchaser, and the evidence shews that this is probable: *Lever* v. *Goodwin* (4).

Napier Higgins, in reply, as to the Defendants' summons for directions to proceed:—

On the construction of the Act and the rules, the disclaimer was made in time. It could be made at any time before actual registration. *In re Goodall's Trade-mark* (5) is not really a decision to the contrary. There was there no disclaimer until it was offered at the Bar. *In re The Swift Specific Company's Trade-mark* (6) tends to the opposite view.

(1) 4 App. Cas. 479.
(2) 27 Ch. D. 681.
(3) 7 App. Cas. 219.
(4) 36 Ch. D. 1.
(5) 42 Ch. D. 566.
(6) 6 Rep. Pat. Cas. 352.

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The Court could make the putting in of a disclaimer a condition of allowing registration: *In re Hudson's Trade-marks* (1); *In re Hayward's Trade-marks* (2); *In re Sykes & Co.'s Trade-marks* (3); *In re Whiteley's Trade-mark* (4); *In re Kuhn & Co.'s Trade-marks* (5).

1890. Aug. 5. NORTH, J. (after stating the facts relating to the Plaintiffs' firm and the registration of their mark and label, continued):—

I will deal first with the Defendants' motion to expunge the registration of the Plaintiffs' label. It is said that their application for registration contained an untrue statement. They were required to state, "If mark used prior to the 13th of August, 1875, how long used?" and they made this statement, "Upwards of ten years before the 13th of August, 1875." It is said that that was an untrue representation, and in my opinion it was so, beyond all question. In the first place, this label contains at the head of it, as a prominent part of it, the Plaintiffs' trade-mark, and that trade-mark was not granted till after 1875. Therefore, it was entirely untrue to say that the label with this trade-mark upon it had been used before 1875, much more ten years before. And, even as to the rest of it, the label had been first introduced in 1870, and therefore it was untrue to say that it had been used upwards of ten years before 1875. There was direct misrepresentation, and on a very important matter.

The information which is to be given by an applicant for registration is required for very important purposes—viz., for the purpose of seeing whether the mark is an old one or a new one—that is, used before or not till after the 13th of August, 1875, very different rights attaching to the mark if it was used before, or if it was not used till after, that date. The Registrar of Trade Marks and the public were both directly misled by the statement which was made. The Registrar was prevented from considering the mark as a new mark, which it really was, when he was told that it was an old mark, and the discretion which the Act gives

(1) 3 Rep. Pat. Cas. 155.
(2) 54 L. J. (Ch.) 1003.
(3) 29 W. R. 235.
(4) Ibid. 235, n.
(5) 53 L. J. (Ch.) 238.

him was applied to an entirely wrong state of things. Then again, the advertisement is published that the public may see it, and that it may be known what opposition is made to the registration of the trade-mark. That is a very important matter; and in this again the public were deceived, and opposition was disarmed. It might well be that a person who, if he had been told that it was a new mark, would have seen that there was some ground upon which he could oppose its registration, would not feel that he had any chance of successful opposition with the knowledge he had, if the mark was, as stated, an old mark. In the first place, if it was an old mark, it would possibly carry back the applicants' user to a date earlier than the user of a similar mark by other persons, who, if they had been told that it was a new mark, would have come forward to oppose because their own marks were older. Then there is another very important matter to be borne in mind—viz., that no person opposing could, if it was an old mark, succeed in his opposition, unless he could shew that it had been used by at least three other persons besides himself before that time. The public, therefore, were entirely misled by the statement.

Then I was told by the Plaintiffs' counsel that the Act does not impose any punishment for such a misstatement. But, in my view, when a registration in a public register is obtained by misrepresentation, the Court is bound to remove the mark from the register, and sect. 90 of the Act of 1883 gives ample jurisdiction for the purpose.

Then, are the Defendants justified in asking to have the mark removed? I think they clearly are. The Court may act "on the application of any person aggrieved . . . by any entry made without sufficient cause" in the register. Beyond all question, the Defendants, who are registered in the same class, are "persons aggrieved" by the mark being on the register when it ought not to be there, when the fact of its being there is made a ground for bringing an action against them for infringement, as it is in the present case. Therefore this part of the Defendants' motion must be granted, and I must make an order that the label be removed from the register. Before parting with this subject, I should say that the explanation given by Mr. *Joseph*

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Baker is, that the statement was made by mistake. I accept his explanation. I have no reason to doubt that he is speaking the truth. But his explanation shews that the application was made, and the necessary information given, with extreme carelessness and neglect of that which ought to have been taken into consideration.

[His Lordship then stated the facts relating to the Defendants' firm, the use and registration of their mark, and their summons to proceed, and continued :—]

I will now dispose of the Defendants' summons. A technical objection was taken to it, because the notice of disclaimer was given after the application to register, and not in it. I do not think it necessary to decide whether that objection is well-founded or not, for the point cannot occur again, because the rules have been altered since that time, and I am not prepared to say that the contention of the Defendants was wrong. At any rate, I should be extremely averse at the present time to dismiss their summons on any such technical ground, when the only result would be, that the Defendants could immediately make a fresh application, with their disclaimer in regular form.

But, in my opinion, the summons must fail on its merits. It is clear, even from the Defendants' own evidence, that the use of the two circles has long been common to the trade, and therefore the Defendants could not register them without a disclaimer. The application would have been hopeless without the disclaimer. But the matter stands in this peculiar way: the Defendants have had their trade-mark, the winged cross, on the register from the year 1877 down to the present time, and they are now asking to register that mark again, *plus* the circles, *minus* the same. They ask that their well-known trade-mark may be registered with the addition of the circles, accompanied by a note that the circles are not part of the trade-mark. That application seems to me an absurd one. I cannot help suspecting that the application would never have been made at all, if the Defendants had appreciated at first that a disclaimer would have to be made.

There is another ground upon which I could not allow the registration as an old mark of the two circles round the winged cross, without anything else. There is no evidence that the

Defendants' goods have ever been known by that mark. It is quite true that some time ago there was a slight casual user of the winged cross with the two circles round it; but there is no evidence that the Defendants' goods were ever known by that mark. In fact, Mr. *Percy Rawson* himself said expressly, that the ordinary use of the winged cross with the two circles round it was in connection with the words "*Rawson Brothers.*" There have been, also, various additional ingredients used from time to time, and I do not see how I can decide in the Defendants' favour on the summons without going contrary to the rules and principles laid down in *In re Spencer's Trade-marks* (1). I must, therefore, dismiss the summons.

I will now deal with the Defendants' motion to expunge the Plaintiffs' trade-mark registered in 1877. The application is, either to expunge the whole trade-mark, or to expunge the two circles, or to add a note that the two circles are common to the trade. It was contended, on behalf of the Plaintiffs, that the application cannot be considered at all, because sect. 76 of the Act of 1883 says, that after the expiration of five years the registration is to be conclusive evidence of the right of the person registered to the exclusive use of the trade-mark. It is, however, well settled by *In re J. B. Palmer's Application* (2); *In re Leonard & Ellis's Trade-mark* (3); *Edwards* v. *Dennis* (4); and *In re Wood's Trade-mark* (5), that this bar does not apply when the trade-mark is one which should never have been registered at all. It is said that those cases were under sect. 5 of the Act of 1875 (which has been repealed), and that the words of that section are not to be found in sect. 90 of the Act of 1883. But I think the words of sect. 90 are large enough; and, moreover, *In re Wragg's Trade-mark* (6) was under the Act of 1883. Then it was said, that in the cases cited the whole of the mark has been in common use, and that they are not authorities for taking a mark off the register because part of it has been commonly used. I do not think this criticism is accurate, and, moreover, the question is, whether the mark is properly on the register; if

(1) 3 Rep. Pat Cas. 73.
(2) 21 Ch. D. 47.
(3) 26 Ch. D. 288.
(4) 30 Ch. D. 454.
(5) 32 Ch. D. 247.
(6) 29 Ch. D. 551.

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not, it ought not to be left standing unexpunged or uncorrected, whatever may be the particular reason why its registration in that form was improper. I think, therefore, that I am not precluded by sect. 76 from hearing the application.

I must next consider whether the trade-mark in question could properly be registered under the Act of 1875. Sect. 10 of that Act provides that, for the purposes of that Act, a trade-mark consists of certain essential particulars, including (which is all that is now material) "a distinctive device or mark," to which there may be added "any letters, words, or figures, or combination of letters, words, or figures." The Defendants say that the device must be distinctive, meaning the whole device, and that a compound device, made up of a mark which by itself is, or might be, distinctive, combined with another mark in common use in the trade, and which, therefore, cannot distinguish the goods of one firm from those of another, is not a device which can be registered under the Act of 1875 (under which I may remark in passing no part of a registered trade-mark could be disclaimed). In support of this argument the Defendants refer to the alteration in the law made by the Act of 1883, the 64th section of which enacts that a trade-mark must consist of or contain one of certain essential particulars, among which are found "a distinctive device or mark;" and the 74th section of which provides that a trade-mark may be registered if it contains some distinctive device, mark, &c., which is made by the Act an essential particular, although coupled with some feature which is common to the trade, provided that the right to the exclusive use of such common feature be disclaimed. (That is how I read sect. 74, though it is not very clearly expressed). And the Defendants say that, though an applicant can under the Act of 1883 register a trade-mark built up as it were in part of common materials, provided he disclaims all right to the exclusive use of such common matters, this was not so under the Act of 1875. The Plaintiffs, on the other hand, say that the device of the lighthouse within the two circles is a distinctive device, and the addition thereto of the letters and figures "*J. B. & S.*, 1837" is expressly authorized by the Act, and not the less so because circles without the lighthouse were in common use. In my

opinion, *Orr-Ewing* v. *Registrar of Trade-marks* (1) throws great light on this subject, and indicates the course which I ought to take. Messrs. *Orr-Ewing* there sought to register as trade-marks certain labels which the committee of experts had placed in the second class. Those labels contained several features wholly ineffectual to create any distinctive device, such as the green colour of the tickets, their triangular shape, the mode of printing the suspended curtain, and the words "Prime Turkey Red," all of which had long been in common use in the trade upon similar articles. But they also contained certain animal figures, with the name and address of the firm added, which, to use the language of Lord *Cairns*, "constituted in each case a distinctive device within the meaning of the Act of 1875, and thus was a trade-mark authorized to be registered under the Act." The House of Lords did not reject the application to register the labels because they contained some matter which was not distinctive, but they directed the Registrar to proceed with the application to register as trade-marks the distinctive devices of animals on the labels, with the name and address of the firm. When in the present case the Plaintiffs applied to the Registrar, he did take upon himself to omit the word "firm," which was included in the application, but he allowed the mark to be registered as it now stands. Of course the Registrar is not familiar with all the marks in common use in every trade, and he can only act upon the materials before him; and, the application having been duly advertised, and no one opposing, he, as a matter of course, allowed the registration. If he had known what we know now, he would have refused the application so far as it related to the circles, but would have granted it as to the rest. As granted it includes the circles, and the registration was, therefore, in my opinion, improper, though through no fault of the Registrar. And under sect. 90 I have jurisdiction to expunge or vary that entry. I must add, however, that this merely applies to the registration of the mark in Class 12. The Defendants' application extends to the registration in Classes 5 and 7 also; but as to those classes they fail entirely, for they are not registered in either of them, and, therefore, are not "persons aggrieved" within sect. 90. There is

(1) 8 Ch. D. 791; 4 App. Cas. 479.

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not, moreover, any evidence that two circles are in common use in the trade in articles falling within those classes.

The question now is, what I ought to do upon this application to expunge or vary the registration. I have no disposition to go further in favour of the applicants than strict justice requires. *Percy Rawson* has produced six separate orders, given by the Plaintiffs to his firm in the years 1881, 1882, and 1883, all shewing the use by the Plaintiffs of the registered trade-mark with the two circles; but no complaint or objection of any kind was then made by the Defendants to such use by the Plaintiffs, nor any suggestion that any right or trade of the Defendants was interfered with thereby: and the Defendants have, with full knowledge, permitted the Plaintiffs to go on using the mark uninterruptedly in the very large trade they are proved to have carried on in files. Independently of this conduct on the part of the Defendants, I am not favourably impressed with the fact that they only move in the matter when they seek to take the two circles away from the Plaintiffs and annex them to their own mark, for which (notwithstanding *Percy Rawson's* explanation) I see no object, except a hope of pulling down to some extent the Plaintiffs' business, and building their own upon its ruins. Further than this, if I were to expunge the Plaintiffs' trade-mark, there is nothing proved which could prevent their applying at once for, and obtaining, a new registration thereof, *minus* the circles. I certainly cannot leave the mark as it stands. I quite concur in Mr. Justice *Pearson's* observations in *In re Wragg's Trade-mark* (1)—that, so long as the mark remains on the register as at present, it apparently gives the Plaintiffs the exclusive right to use it; it would enable them, if they were minded to do what was unjust and fraudulent, to terrify other persons, by informing them that they have no right to use circles which are common to the trade, because the Plaintiffs have improperly registered them as their own. I do not mean to suggest that the Plaintiffs have done anything fraudulent or, to their knowledge, unjust; but I cannot leave the mark as it stands in Class 12. I think, however, that full justice will be done if I accede to that part of the Defendants' motion which seeks that the register of trade-

(1) 29 Ch. D. 551.

marks may be rectified by adding a note, that so much of the Plaintiffs' trade-mark as consists of the device of two circles is common to the trade, and I direct such a note to be added accordingly, limited to Class 12 only.

[His Lordship then dealt with the action. He said that there was great similarity between the Defendants' labels and those of the Plaintiffs. But he was satisfied from the history of the Defendants' labels as proved in evidence that the Defendants had no intention to deceive, and that their labels were not copied from those of the Plaintiffs. As to the trade-mark, the most doubtful part of the case was the use by the Defendants of the letters "*R. B. S.*", and the date "1877," between the circles, which they did not begin till 1885. Here, again, upon the evidence, his Lordship gave the Defendants credit for an absence of any intention to deceive, and he was satisfied that they did not commence the use of those letters and figures with the intention of imitating the Plaintiffs' trade-mark. Still, if it were proved that the use of the Defendants' label would deceive, the continued use of it by them would be fraudulent. The evidence on this point was very vague, and his Lordship was not satisfied that the Defendants' labels would deceive. Moreover, no actual case of deception had been proved. It was not essential to prove actual deception; but, when the evidence of probability of deception was doubtful, it was an important circumstance that no actual case of deception had been proved. His Lordship would, therefore, accept the undertaking which the Defendants had offered in their statement of defence, viz., not in the future to use "*R. B. S.*, 1877," between the two circles when surrounding their trade-mark. The action would be dismissed. The Defendants' summons to proceed would be dismissed, and, on their motion to expunge, the limited order already mentioned would be made. His Lordship continued:—]

Then comes what is probably the most important matter of all to both parties—the question of the costs of this litigation, which has extended over nineteen days in Court. The Defendants' summons for directions to proceed has failed altogether. Their motion against the Plaintiffs has succeeded as to the label, but as to the trade-mark it has failed in great part. Then, as to the costs of the

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action, I am satisfied that it would be absolutely impossible for any Taxing Master to do justice between the parties by distinguishing the costs of one part of the case from another; and, therefore, if I thought the costs ought to follow the result so far as they can, it is impossible that justice should be arrived at in that way. I could not do it myself, though I have heard the whole case, and know a great deal more about the details than any Taxing Master could. He could only make a guess completely in the dark, and he would be certain to be a long way from the truth. The action charged the Defendants with a fraud; and as a general rule, such a case is one in which of all others the costs should follow the result. That is the view which I have always taken, as have other Judges also; but I feel a great difficulty about it in the present case for this reason. The Plaintiffs had a good *primâ facie* case against the Defendants, though the Defendants have succeeded in displacing it. But the Defendants have also charged fraud against the Plaintiffs without any *primâ facie* case at all. By their defence the Defendants charged the Plaintiffs with attempting to divert to themselves the whole or a considerable portion of the Defendants' Indian trade. In my opinion, there is nothing whatever to justify such a charge, and it ought never to have been made, unless evidence could have been produced in support of it of a very different character from any which has been produced. Moreover, an attempt was made in the course of the hearing to charge the Plaintiffs with having copied the mark of a Mr. *Wolstenholme*; and, in my opinion, that charge also fails. Under these circumstances, I think I shall not be departing from my rule—that the costs shall follow the event where fraud has been unsuccessfully charged—if I give no costs in the present case; for, though the Plaintiffs have unsuccessfully charged the Defendants with fraud, the Defendants have unsuccessfully made a precisely similar charge against the Plaintiffs. I, therefore, give no costs to either side of any part of the case.

Solicitors: *F. A. & A. C. Doyle*, agents for *Binney & Son, Sheffield; McKenna & Co.*

W. L. C.

STIRLING, J.

1890

Feb. 18, 19, 20; *March* 27.

In re CARDIFF SAVINGS BANK.

DAVIES' CASE.

Savings Bank — Winding-up — Trustees and Managers — Neglect — Omission — Liability — Contributory — Misfeasance — Trustee Savings Banks Act, 1863 (26 & 27 *Vict. c.* 87), *ss.* 2, 3, 6, 10, 11 [*Revised Ed. Statutes, vol. xiv., pp.* 636, 638, 640] — *Trustee Savings Banks Act*, 1887 (50 & 51 *Vict. c.* 47) — *Companies Act*, 1862, *ss.* 165, 200 [*Revised Ed. Statutes, vol. xiv., pp.* 238, 249].

Any trustee or manager of a savings bank who neglects or omits to comply with the rules and regulations of the savings bank within the meaning of sect. 11 of the *Trustee Savings Banks Act*, 1863, may be compelled under sect. 165 of the *Companies Act*, 1862, to pay an adequate sum towards the assets of the bank by way of compensation for any loss occasioned to the bank by his neglect or omission.

But no trustee or manager of a savings bank, who has incurred personal liability within the exceptions from the protection conferred by sect. 11 of the *Trustee Savings Banks Act*, 1863, can, by reason of such liability, be made a contributory in the winding-up of the savings bank, or be called upon to contribute to the costs, charges, and expenses of the liquidation.

THE *Cardiff Savings Bank* was originally formed in 1819. It was reconstituted after the passing of the *Trustee Savings Banks Act*, 1863, under rules which were certified by Mr. *Tidd Pratt* on the 19th of November, 1863, and it was now in process of being wound up as an unregistered association under the *Trustee Savings Banks Act*, 1887 (50 & 51 Vict. c. 47), s. 3, and the *Companies Act*, 1862, upon the petition of the Commissioners for the Reduction of the National Debt.

This case came on for hearing upon two applications — (1.) upon the adjournment into Court of an application made in Chambers by the Official Liquidator of the bank to have Mr. *Peter Davies*, one of the former trustees and managers of the bank, settled on the list of contributories; and (2.) upon a summons taken out by the official liquidator asking that *Davies*, as being a contributory, or otherwise under the provisions of sect. 165 of the *Companies Act*, 1862, and having regard to the 11th section of the *Trustee Savings Banks Act*, 1863, might be

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declared liable in respect of certain acts and omissions which, as the liquidator alleged, fell within the exceptions from the protective enactments contained in sect. 11 of the Act of 1863.

The preamble of the Act of 1863 recites as follows: "Whereas numerous banks for savings have been established under the authority of the Acts now in force for the safe custody and increase of small savings. . . . . ." The 2nd section of the Act, after reciting that "it is expedient to give protection to such savings banks already established as aforesaid and the funds thereof, and to afford encouragement to the formation and establishment of like institutions," provides that persons forming a society for the purpose of establishing a savings bank may obtain the benefit of the provisions of the Act by causing the rules and regulations for the management of such institution to be entered, deposited, and filed as the Act directs; and the 3rd section provides, *inter alia*, that no savings bank shall have the benefit of the Act unless its rules and regulations are "entered in a book or books to be kept by an officer of such savings bank to be appointed for that purpose, and which book or books shall be open at all seasonable times for the inspection of the persons making deposits in the funds of such savings bank."

The other material provisions of the Act are as follows:—

"Sect. 6. No savings bank, subject to the proviso hereinafter contained with respect to the branch offices or local receivers of any savings bank, shall have the benefit of this Act unless in the rules and regulations for the management thereof it shall be expressly provided—

"(1.) That no person or persons being treasurer, trustee, or manager of such savings bank, or having any control in the management thereof, shall derive any benefit from any deposit made in such savings bank, save only and except such salaries and allowances or other necessary expenses as shall according to such rules and regulations be provided for the charges of managing such savings bank, and for remuneration to officers employed in the management thereof, exclusive of the treasurer or treasurers, trustee or trustees, manager or managers, or other persons having direction in the management of such savings bank, who shall not directly or indirectly have any salary, allowance, profit, or benefit

whatsoever therefrom beyond their actual expenses for the purposes of such savings bank.

"(2.) That not less than two persons, being either trustees, managers, or paid officers appointed for that specific purpose, and, where two only, except in the case of savings banks which are open for more than six hours in every week, one such person to be a trustee or manager, be present on all occasions of public business, and be parties to every transaction of deposit and repayment, so as to form at least a double check on every such transaction with depositors.

"(3.) That the depositor's pass-book shall be compared with the ledger on every transaction of repayment, and on its first production at the bank after each 20th day of November.

"(4.) That every depositor in a savings bank established under this Act shall once at least in every year cause his deposit-book to be produced at the office of the said savings bank for the purpose of being examined.

"(5.) That no money be received from or paid to depositors except at the office or branch offices where the business of the savings bank is carried on under the authority of the board of managers, and during the usual hours for public business.

"(6.) That a public accountant or one or more auditors be appointed by the trustees and managers, but not out of their own body, to examine the books of the bank, and to report in writing to the board or committee of management the result of such audit, not less than once in every half-year, also to examine an extracted list of the depositors' balances made up every year to the 20th day of November, and to certify as to the correct amount of the liabilities and assets of the bank.

"(7.) That a book containing such extracted list of every depositor's balance, omitting the name, but giving the distinctive number and separate amount of each, and shewing the aggregate number and amount of the whole, checked and certified by such public accountant or auditors, be open at any time during the hours of public business for the inspection of every depositor as respects his own account, to examine his own deposit-book therewith, and the general results of the same.

"(8.) That the trustees and managers or committee of

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management shall hold meetings once at least in every half-year, and shall keep minutes of their proceedings in a separate book provided for that purpose.

"(9.) Provided, that where savings banks are established with agents or local receivers elsewhere than at the head office, the rules shall provide for the due receipt of and accounting for all moneys by such agents or local receivers on account of such savings banks respectively, and also for the presence of a second party in every transaction when money is paid or received, and also for the periodical examination of the depositors' book with the ledger once at least in every year."

By the 10th section it is enacted that all moneys, securities, and effects of the bank shall be vested in the trustees for the time being for the benefit of the bank and the depositors therein, and after the death or removal of a trustee shall vest in the succeeding trustee for the same estate and interest, and subject to the same trusts without any conveyance.

Sect. 11 defines the liability of trustees and managers, and is as follows:—

"No trustee or manager of any savings bank . . . shall be personally liable, except—

"1. For moneys actually received by him on account of or for the use of such savings bank, and not paid over and disposed of in the manner directed by the rules of the savings bank.

"2. For neglect or omission in complying with the rules and regulations required by this Act to be adopted as hereinbefore is provided in the maintenance of checks, the audit and examination of accounts, the holding of meetings and keeping minutes of proceedings thereat.

"3. And also for neglect or omission in taking security from officers as is hereinbefore provided."

Sect. 21 provides that, on payment of money by the savings bank into the Banks of England or Ireland to the account of the National Debt Commissioners, their officer is to give a receipt for the same, which is to carry interest at a rate subsequently reduced to £3. Sect. 23 provides that the interest to be received by the

depositor shall not exceed £3 0*s.* 10*d.* per cent. per annum, which by a subsequent enactment is reduced to £2 15*s.*

Sect. 38 enacts that depositors in one savings bank shall not deposit in any other savings bank; sect. 39 restricts the amount which may be deposited in the bank; and sect. 55 imposes upon the trustees and managers the duty of making up annual accounts, shewing the balance or principal sum due to all the depositors, and a statement of the expenses incurred, and in whose hands such balance is remaining, and requires them to transmit such accounts to the Commissioners for the Reduction of the National Debt.

The rules of the bank provided (rule 2), that the bank should be open for receipts and payments on every Saturday throughout the year, between ten and two o'clock, or on such day or days in every week as the trustees and managers for the time being should in general or special meeting determine; and for the receipt of deposits only on every Monday and Saturday evening from seven till half-past eight o'clock.

No day, other than those specified in the rules, for receipts or payments was ever appointed.

The business of the *Cardiff Savings Bank* was conducted by a president, seventeen trustees, and thirty-seven managers. The Respondent, *Peter Davies*, became a manager of the bank in the year 1868, and a trustee for it in 1882. He was a draper, and carried on his business at No. 10, *Duke Street, Cardiff*, in which street the offices of the bank were situated; and, according to the evidence, he took an active part in the management of the bank from the date of his appointment as manager down to the time when the bank ceased to carry on business.

Mr. *James Emerson Williams* was the actuary and paid officer of the bank from the year 1850 down to the time of his death on the 26th of March, 1886; and, according to the evidence, he enjoyed throughout his life the respect and confidence of the trustees and managers of the savings bank, as well as of his fellow-citizens at *Cardiff*, where he held various public offices. After his death, however, it was ascertained that he had been guilty of fraud, and had abstracted large sums of money (amounting altogether to about £30,000), which ought to have been

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found in the coffers of the bank, whose assets were insufficient to meet the claims against it by a considerable amount. Under these circumstances the bank, in April, 1886, suspended payment. Subsequently, in or about September, 1886, arrangements were made by the trustees and managers under which a large number of the depositors of the bank accepted payments, in some cases of 17*s.* 6*d.* in the pound, and in other cases of 17*s.* in the pound, in satisfaction of their claims. A certain number of the depositors, however, refused to accept these terms, and the affairs of the bank were investigated by Mr. *Lyulph Stanley*, a commissioner appointed under the Act of 50 & 51 Vict. c. 47; and, ultimately, upon the petition of the Commissioners for the Reduction of the National Debt, an order was made for the winding-up of the bank as an unregistered company.

The various matters in respect of which the liquidator charged Mr. *Peter Davies* with misfeasance or breach of trust in relation to the bank were grouped under the following heads:—

(*a.*) Neglecting, or omitting to comply with the rules and regulations required by the Act of 1863 with reference to transactions of deposit and repayment;

(*b.*) Neglecting or omitting to comply with such rules and regulations with reference to the audit and examination of accounts;

(*c.*) Permitting deposits to be received which were illegal or irregular by reason of their exceeding in amount the limits imposed by the Act, or by reason of the depositor being entitled to some benefit from other funds in the bank, or from funds in another savings bank; and

(*d.*) Misapplication of the funds after it suspended payment in connection with the arrangements for effecting composition with the depositors.

It was alleged by the liquidator, and in the opinion of the Court it was established by the evidence, that to the knowledge of the Respondent, Mr. *Peter Davies*, the requirements of the statute of 1863, and of the rules of the bank, were not complied with as regards the maintenance of checks and the examination of accounts.

The evidence shewed that the actuary was in the habit of

receiving deposits, and making repayments, on other days than Saturday and Monday, and in the absence of a trustee or manager. The sums so received or paid were entered in the depositor's pass-book, and also in the cash-book kept by the actuary; and this latter book was signed by the depositor. Afterwards, in many cases, the entries in the actuary's cash-book were copied into the cash-book kept by the trustees, and the transactions, though not taking place during hours of public business, thus appeared to have taken place at a time when the bank was opened for such business. In the opinion of the Court the Respondent *Davies* upon his cross-examination practically admitted this to have been the state of facts.

The result of this mode of conducting the affairs of the bank was that the actuary falsified the cash-book and represented that he had made greater payments than he actually had made, and had received smaller sums than had actually come to his hands. In each case he retained the difference, and thus committed frauds to a very large extent. In the judgment delivered by the Court the two following cases were given by way of illustration of what took place.

In the pass-book of a depositor named *Albert Cope* a sum of £15 8*s.* 8*d.* was entered as having been repaid to him on the 19th of December, 1884, which was a Friday, and this entry was initialled by the actuary and posted to the ledger. In the cash-books of the actuary and the trustees (the entry in the latter being in the handwriting of the Respondent *Davies*) the repayment appeared under the date of Saturday the 20th of December, 1884, and as of a sum of £45 8*s.* 8*d.* An examination of the actuary's cash-book satisfied the Court that the repayment was originally correctly entered as £15 8*s.* 8*d.*, and was subsequently altered (presumably after the depositor had signed the book) by the figure 1 in 15 being changed into 4. The result was that the balance handed over to the treasurer of the bank on the 20th of December at the close of business was less by £30 than it ought to have been.

Again, in the pass-book of a depositor named *Eliza Snelling* there was an entry of a receipt from her of £45 which was signed by the actuary. This transaction was entered in the cash-book

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of the actuary and trustees (the entry in the latter being in the handwriting of *Peter Davies*); under the date of the 5th of July, 1884, is a receipt of £40 only. The receipt of the £45 was duly posted to the ledger; but £5, the difference between the £45 and £40, never came into the possession of the bank, and was presumably retained by the actuary.

In each of these cases the pass-book of the depositor agreed with the ledger of the bank, and in the ordinary course of things the fraud could hardly have escaped the detection of the auditor, but the learned Judge found as a matter of fact that the actuary kept back from the auditor a certain number of the ledgers of the bank, and that although one of the requirements of the statute and rules was that a list of the depositors' balances, made up every year to the 20th of November, should be extracted and examined and checked and certified by the auditor, and should be open for the inspection of depositors, this was never done, notwithstanding that the attention of the trustees and managers was called to the omission by the auditor in 1884 and 1885.

Sir *R. E. Webster*, A.G., *Fischer*, Q.C., and *Ingle Joyce*, for the liquidator:—

The evidence shews that the Respondent *Davies* has been guilty of neglect or omission in complying with the rules and regulations required by the *Trustee Savings Banks Act*, 1863, in the maintenance of checks and the audit and examination of accounts and in other respects. He is thus excepted from the protective enactment contained in sect. 11 of the Act of 1863; and these neglects or omissions of his having enabled the actuary and paid officer of the bank to perpetrate and conceal frauds, *Davies* is personally liable to the depositors to the full amount of their deposits. His conduct constitutes a misfeasance or breach of trust in relation to the bank, for which he is liable, under sect. 165 of the *Companies Act*, 1862, to make compensation by contributing a proper sum to the assets of the bank: *Clough* v. *Bond* (1); *Ghost* v. *Waller* (2); *Bostock* v. *Floyer* (3); *In re Oxford Benefit Building and Investment Society* (4).

(1) 3 My. & Cr. 490.
(2) 9 Beav. 497.
(3) Law Rep. 1 Eq. 26.
(4) 35 Ch. D. 502.

Davies is also liable as a contributory under sect. 200 of the *Companies Act*, 1862, which enacts that every person liable at law or in Equity to pay or contribute to any debt or liability of the company, or to the costs, charges, or expenses of winding it up, is to be deemed to be a contributory. The sums due to the depositors are debts or liabilities of the bank, and *Davies* is liable to contribute towards them. At all events, he is liable to contribute towards the expenses of the winding-up.

[They also referred to *Crisp* v. *Bunbury* (1).]

Buckley, Q.C., and *Upjohn*, for the Respondent *Davies*:—

The losses sustained by the bank are no more attributable to the Respondent than to any of the other trustees or managers of the bank. The moneys lost were in fact received by the actuary after office hours and embezzled, and it is said that *Davies* as one of the trustees is responsible for allowing moneys to be so received. But out of office hours the bank had no power to receive anything; the actuary could then only receive and hold moneys for the depositors personally, and neither the trustees nor the savings bank as an association are responsible for moneys so received. At any rate, the mere fact that more money was received for or by the bank than they ought to have received does not create a loss, and the liquidator must connect *Davies* with some act which was a *causa causans* of a loss. All that is shewn is that *Davies* was one of a body of some thirty people who were bound to see that one of them did a particular act on a particular day. No one of the body severally owed the duty, and yet the liquidator seeks to charge one particular individual because none of the thirty were there.

[STIRLING, J.:—Why is *Davies* to be excused because twenty-nine other people were liable with him? It may be that there is a case for contribution.]

The common law liability in damages for negligence does not arise unless loss results from the acts of the person who is charged, and it must be shewn that it is his act which has occasioned the loss. That cannot be shewn here. The loss here was in every

(1) 8 Bing. 394.

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case complete before the Respondent did anything. The proximate cause was the fraud of the actuary, and the damage as regards *Davies* is too remote: *Swan* v. *North British Australasian Co.* (1); *Johnston's Claim* (2). No case has been made against him personally, and any inquiry as to the conduct of the trustees generally ought to take place in the presence of the whole body. Secondly, the Respondent can neither be made a contributory in the winding-up nor compelled to contribute towards the costs, charges, and expenses of the winding-up: *Lee and Moor's Case* (3); *Ex parte Littledale* (4); *Ex parte British Nation Life Assurance Association* (5). That would be a liability in the character of a partner, and any such liability is entirely excluded by the terms of sect. 11 of the *Trustee Savings Bank Act* of 1863. It was, in fact, the object of that section so to do.

Sir *R. E. Webster*, A.G., in reply, referred to *Forbes* on the Savings Banks Acts; *Cooke* v. *Lord Courtown* (6); *Moore and De la Torre's Case* (7).

1890. March 27. STIRLING, J. (after stating the facts of the case continued):—

The rules of the *Cardiff Savings Bank* embody, in most cases in the very language of the statute, the requirements of sect. 6 of the Act of 1863. If these had been duly observed, then (1.) no money could have been received or paid from or to depositors except at the offices of the bank during the usual hours for public business; (2.) one trustee or manager ought, in addition to the actuary, who was a paid officer of the bank, to have been present on all occasions of public business, and to have been a party to every transaction of deposit and repayment; (3.) the depositor's pass-book should have been compared with the ledger on every transaction of deposit and repayment; (4.) a list of depositors' balances should have been extracted and examined by the auditor once in every year; and (5.) a book containing such extracted list of every depositor's balance, checked

(1) 2 H. & C. 175.
(2) Law Rep. 6 Ch. 212.
(3) Ibid. 5 Eq. 368.
(4) Law Rep. 9 Ch. 257.
(5) 8 Ch. D. 679.
(6) 6 Ir. Eq. Rep. 266.
(7) Law Rep. 18 Eq. 661.

and certified by the auditor, should have been open at any time during the hours of public business for the inspection of every depositor as respects his own account.

It is alleged by the liquidator, and, in my opinion, it is established by the evidence, that to the knowledge of the Respondent these requirements of the statute and the rules were not complied with. [His Lordship then referred to the evidence, and resumed:—] It appears to me, therefore, that the rules and regulations required by the Act of 1863 to be adopted as regards the maintenance of checks and the examination of accounts were to the knowledge of the Respondent not complied with; and the question then arises, what is his liability in respect of that?

Now, apart from the statute, if the president and trustees and managers had carried on the business of a savings bank, and had received by themselves or their agents sums of money from depositors, I apprehend that they would have become indebted to the depositors for the sums so received, and would each have been liable to the last farthing of his fortune for the debts so incurred, and the circumstance that the business was carried on from benevolent or public-spirited motives would not have served to exonerate any one of them from complete satisfaction of such liability. The Legislature has, however, thought fit to intervene, and, regarding the promotion of thrift amongst persons of small means as a matter of great public importance, has enacted the statute of 1863 (26 & 27 Vict. c. 87), to which I have so often referred, and by its provisions the liabilities of the trustees and managers of savings banks are limited in the manner provided by sect. 11. [His Lordship read that section, and then continued:—] On this occasion I have not to deal with any liability under sub-sect. 1 of that section, for, although attention was directed to it in argument, it was ultimately admitted that the summons before me was not framed with reference to that sub-section, and any liability of the Respondent will be unaffected by my decision on the present occasion. What I have to deal with is the liability of *Davies*, arising from his neglect or omission to comply with the rules and regulations referred to in sub-sect. 2.

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It was contended that under sect. 200 of the *Companies Act* of 1862, *Davies* is liable as a contributory. The material part of that section is as follows: "In the event of an unregistered company"—which this bank is to be treated as being—"being wound up every person shall be deemed to be a contributory who is liable, at law or in Equity, to pay or contribute to the payment of any debt or liability of the company, or to pay or contribute to the payment of any sum for the adjustment of the rights of the members amongst themselves, or to pay or contribute to the payment of the costs, charges, and expenses of winding up the company." Now, this section has been the subject of judicial construction in several cases, and, in particular, it was dealt with by the Court of Appeal in the case of *Ex parte British Nation Life Assurance Association* (1). Lord Justice *James*, in giving judgment in that case, says (2): "It is said that, under the 200th section of the Act of 1862, all persons legally or equitably liable to contribute to the assets are contributories, and may be put on the list as such. It is impossible to hold that any person who is a debtor to the company in liquidation can be put on the list of contributories. He is bound to pay moneys, which moneys, when paid, will be part of the assets of the company, and in that sense he is liable to contribute to the assets, but that does not make him a contributory within the meaning of the Act. Again, a person who has taken shares in the name of a trustee is, as between him and his own trustee, the person liable to contribute, but that does not make him a contributory as between him and the company. The company may get at him, as it has in several instances, through and in the name of the trustee. But still the equitable liability is to the trustee only, and there is no privity or direct right of any kind as between the company and the *cestui que trust*. If an officer of the company has misappropriated assets"—that is a very material point—"he may be made to refund them to the liquidator as part of the assets, but that does not make him a contributory. The plain meaning of the Act is a legal or equitable liability to contribute in the character of a partner." By that exposition of the meaning of the enactment I am bound; and I therefore hold

(1) 8 Ch. D. 679. (2) 8 Ch. D. 708.

that the liability referred to in sect. 200 is, in the words used by *James*, L.J., "a legal or equitable liability to contribute in the character of a partner."

Is this, then, the nature of *Davies*' liability? In my opinion it is not. I think that sect. 11 of the Act of 1863 relieves him of such a liability; but that as the price of such exemption it imposes another, namely, liability for neglect or omission in complying with the rules and regulations. I think that this liability does not make him a contributory any more than does the liability of an officer of a company to refund to the liquidator assets of the company which he has misappropriated.

It was said, however, that even if *Davies* were not liable to pay or contribute to the payment of any debt or liability of the bank, he was, at all events, liable to pay or contribute to the payment of the costs, charges, and expenses of the winding-up. In my opinion this is not so. The liability to contribute to the costs of winding-up must, like the liability to contribute to debts, be a legal or equitable liability in the character of a partner. If, without any default on the part of the trustees or managers, the assets had proved insufficient for the satisfaction of the liabilities of the bank, and it had become necessary to have recourse to the powers of winding-up merely in order that the liabilities might be duly ascertained and the assets properly distributed, I cannot see how, in the face of sect. 11 of the *Trustee Savings Bank Act* of 1863, it would be possible to hold the trustees or managers liable for any part of the costs of such a winding-up. The liability in respect of these costs, if such there be, must be attributable to the neglect or omission specified in that section; whether by reason of that liability he could be compelled to pay any part of the costs of winding-up, it is unnecessary now to determine; but in my opinion Mr. *Davies* cannot be placed on the list of contributories.

Is he then liable under sect. 165 of the *Companies Act*, 1862? That section provides that when, in the course of the winding-up of any company, it appears that any past or present director, manager, or any officer of the company, has been guilty of any misfeasance or breach of trust in relation to the company, the Court may compel him to contribute such sum of money to the

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assets of the company, by way of compensation in respect of such misfeasance or breach of trust, as the Court thinks fit. The Legislature has, by sect. 11 of the *Trustee Savings Banks Act*, 1863, relieved the trustees and managers of savings banks from personal liability except for neglect or omission to comply with certain rules and regulations. Those rules and regulations have, to the knowledge of *Davies*, not been complied with; and under these circumstances it appears to me that he has been guilty certainly of omission, if not also of neglect, within the meaning of the statute. That omission or neglect appears to me to constitute a misfeasance or breach of trust within the meaning of sect. 165, and I think by reason of it there is sufficient *primâ facie* evidence to satisfy me that the assets of the bank are less than they ought to have been, and that claims which those assets are insufficient to satisfy may be established in the winding-up. That being so, Mr. *Davies* may, in my opinion, be properly compelled to contribute an adequate sum to the assets of the company by way of compensation.

It was said on behalf of the Respondent that the actuary was a man of high respectability, who enjoyed the confidence, not only of the trustees and managers, but of all his fellow-townsmen in *Cardiff*. That appears to me to be no defence whatever. The Legislature has imposed on the trustees and managers this obligation—that not less than two persons shall be present on all occasions of public business for the purpose of watching and checking all transactions of deposit and repayment. That duty to the knowledge of *Davies* was omitted to be performed. What was the object of the double check, for the maintenance of which provision is so anxiously made by the statute? Surely to prevent the bank from being defrauded. How, then, can it be any excuse for the omission that the transaction of business was intrusted to a single person who to all appearance was worthy of trust? Such persons, as experience shews, not unfrequently yield to such temptations as were offered in the present case; and the possibility of such an event was an evil against which the Legislature desired to guard. Such frauds constitute the very mischief which it was the aim of the statute to prevent.

These observations appear to me to answer another objection

urged on behalf of the Respondent—namely, that the damage occasioned by the acts of the actuary was too remote.

Again, it was said that other trustees and managers were not less responsible than *Davies* for the non-observance of the statutory requirements, and that an order ought to be made against them as well as against him. The evidence certainly appears to indicate that other trustees and managers may have been aware of the disregard of the regulations, and it is quite possible that at some future period they may be held liable for neglect or omission, such as I hold to be established against *Davies*. If so, it may be desirable that the amount to be contributed by each of them to the assets of the company by way of compensation should be ascertained at one and the same time; but this appears to me to afford no reason why I should abstain from now making a declaration of the liability of Mr. *Davies*.

It was expressly laid down, in *In re British Guardian Life Assurance Company* (1), that there is nothing in sect. 165 which points to the necessity of having everyone concerned before the Court upon an application under it.

On one matter which was pressed upon me I must say a few words, although I do not regard it as at present ripe for decision.

It was strenuously contended that the actuary had no authority on behalf of the bank to receive any sums of money out of the usual hours for public business, and that there could be no liability on the part of Mr. *Davies* for any such receipts which did not come to the actual possession of the bank. It is to be remembered, however, that the true receipts were entered in the pass-books of the depositors and in the ledgers of the bank, and that in many cases the depositors were compromised with on the footing of assets of the bank being liable to make good these receipts; and, without expressing a final opinion on the question, I am of opinion that there is a case for further investigation in respect of which Mr. *Davies* may ultimately be found to be under some liability.

Subject to any observations which may be made on the form of the order, I think I am bound to declare that Mr. *Davies* is liable for neglect of or omission in complying with the rules

(1) 14 Ch. D. 335.

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and regulations required by the statute 26 & 27 Vict. c. 87, to be adopted in the maintenance of checks and the examination of accounts, and to direct an inquiry what sums of money ought to be contributed by him to the assets of the company in respect of such neglect or omission.

With the remaining questions raised by the summons I propose to deal briefly, for they also appear to be at present not ripe for decision. It appears that sects. 38 and 39 of the *Trustee Savings Banks Act* of 1863 have been violated, and that deposits were received by the bank which were totally or partially improper to be received, either by reason of the deposits exceeding in amount the limits imposed by statute, or by reason of the depositor being entitled to some benefit from the funds of the bank or some other savings bank. In 1884 and 1885 the attention of the directors was called to this by the auditor's reports. In 1884 the auditor states: "I have called the actuary's attention to some balances in excess of the Government limit, and he will give notice to the depositors forthwith, that they may be brought within bounds." In 1885 he says: "I have seen again some balances in excess of the Government limit, to which I have called the actuary's attention." The result of this is, that the National Debt Commissioners have paid interest on deposits of larger amount than the statute authorizes, and they have made a claim in the winding-up to be repaid the interest on such deposits so far as they exceeded the legal limit. Until that claim has been dealt with and its validity established it would seem to me premature to express an opinion on the liability of Mr. *Davies* in respect of these excessive deposits.

Lastly, the trustees and managers are alleged to have misapplied the funds of the bank, after the suspension of payment, in stamping the documents by which certain of the depositors purported to release the trustees and managers from liability, in providing for the costs and expenses of, and connected with, the preparation and execution of such documents and otherwise, and in payments to a Mr. *Roberts* for services in connection with what is termed "the unauthorized winding-up of the bank" and otherwise. Questions are likely, as I understand, to arise in the present winding-up with reference to these releases and the pro-

ceedings of the trustees and managers after the suspension of the bank; and until these have been disposed of I do not see how the claims of the liquidator can be effectually dealt with. It seems to me best that these portions of the summons should simply stand over for the present.

Solicitors: *Solicitor to the Treasury; Bell, Brodrick, & Gray,* agents for *H. Cousins, Cardiff.*

W. W. K.

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[1889 G. 987.]

Mortgage—Consolidation—Notice by Mortgagees under sect. 20 *of the Conveyancing and Law of Property Act,* 1881, *to pay off one Mortgage—Election—Debenture-holders of one Equity of Redemption purchased by a Company limited—Numerous Parties—Costs—*15 *&* 16 *Vict. c.* 86, *s.* 42 [*Revised Ed. Statutes, vol. xi., p.* 523]*—Rules of Supreme Court,* 1883, *Order* XVI., *r.* 9; *Order* LV., *rr.* 5*a and* 5*b.*

Mortgagees holding several mortgages executed by the same mortgagor, who have excluded the 17th section of the *Conveyancing and Law of Property Act,* 1881 (44 & 45 Vict. c. 41), are entitled to consolidate, although they have given notice under sect. 20 to the mortgagor to pay off one of the mortgages, in order to acquire a power of sale, and the mortgagor has prepared for the payment and tendered the money, the doctrine of election having no application.

Where the equity of redemption in one of the mortgages had been purchased by a company limited, and the company had issued debentures to a large amount which were a charge on the mortgaged property, it was held that all the debenture-holders, having an interest in the equity of redemption, must be made parties to a foreclosure action, and not merely some as representatives of the whole, under Rules of Supreme Court, 1883, Order XVI., rule 9.

THIS was a summons taken out under Rules of Supreme Court, 1883, Order LV., rule 5*a*, on the 23rd of May, 1889, for the foreclosure of three mortgages—(1) dated the 22nd of December, 1876; (2) the 13th of November, 1882; and (3) the 25th of January, 1888. They were all executed by the same mortgagor in favour of the same mortgagees. Each mortgage was of different property, and the third contained a clause negativing the application of the 17th section of the *Conveyancing and Law*

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of Property Act, 1881 (44 & 45 Vict. c. 41). The Defendant had purchased the equity of redemption in the property comprised in the mortgage of the 25th of January, 1888, and which secured the repayment of the sum of £14,200, and interest thereon. On the 27th of February, 1889, the Plaintiffs gave the Defendant notice requiring him to redeem the mortgage of the 25th of January, 1888, at the end of three months. The Defendant made preparations for paying off the sum owing, and of that fact the Plaintiffs were fully aware. At the end of the three months the Defendant tendered the moneys due to the Plaintiffs on that mortgage; but the tender was refused by the Plaintiffs, who insisted upon their right to consolidate the three mortgages mentioned in the summons.

The correspondence between the solicitors of the parties in reference to the paying off of the mortgage of January, 1888, is fully set forth in the judgment.

Hastings, Q.C., Sir *H. Davey*, Q.C., and *Ingle Joyce*, for the Plaintiffs' summons:—

The only question is, whether the Plaintiffs, having a right to consolidate the three mortgages of 1876, 1882, and 1888, and which by the summons they claim to do, did by giving the notice to pay off the moneys owing on the mortgage of 1888, which they were under the 20th section of the *Conveyancing and Law of Property Act*, 1881 (44 & 45 Vict. c. 41), bound to do, lose that right. The Defendant, as the correspondence between the solicitors shews, asserts, that by giving the notice the Plaintiffs did lose their right to consolidate. It is well known that a mortgagee is entitled to enforce all his rights at one time, and it is submitted that by giving the notice to pay off one mortgage the Plaintiffs did not waive and will not be deprived of their rights. If the Plaintiffs had sold any one of the mortgaged properties, and there was a surplus over the moneys owing upon that mortgage, they could have retained and applied it in part payment of the other mortgages. [The cases of *Keene* v. *Biscoe* (1), *Selby* v. *Pomfret* (2), and *Cummins* v. *Fletcher* (3), were referred to.]

(1) 8 Ch. D. 201. (2) 1 J. & H. 336; 3 D. F. & J. 595.
(3) 14 Ch. D. 699.

Rigby, Q.C., and *George Henderson*, for the Defendant:—

Mortgagees have a clear right, no doubt, if they choose to insist upon it, to consolidate their mortgages. There is no dispute as to that right in this case; but the Plaintiffs chose to make an election and to rely upon the security contained in the mortgage of January, 1888, alone.

[STIRLING, J.:—As to election, must not something be done which is inconsistent with the right to consolidate?]

It was communicated to the Defendant that the Plaintiffs wanted him to pay off the moneys owing on the mortgage of 1888, and that was quite inconsistent with consolidation. The relation of the parties was altered when the Plaintiffs served the notice of the 27th of February, 1889, requiring the mortgage moneys to be paid at the end of three months. Their position was changed altogether by having taken that step. The Defendant was not bound to consider that the right to consolidate would be insisted upon. Can the right exist after putting the Defendant to the expenses which he had incurred in finding the money and tendering it? The Court has no control over those expenses. On the question of election, the case is governed by *Scarf* v. *Jardine* (1), and *Ex parte Adamson* (2). There is nothing in *Selby* v. *Pomfret* (3) which touches this case, which is not one of tacking. The Plaintiffs defined by the notice the equity which they themselves relied on, and when they encouraged the owner of the equity to do certain things there is no authority for allowing them now to consolidate. The Defendant's position was changed for the worse, inasmuch as he was obliged to incur the heavy expense consequent upon employing a solicitor to find the money, and to arrange for the payment off of the mortgage debt. There is no evidence that the Plaintiffs were put to any extra costs, after the right to consolidate was, as submitted, given up by them, *i.e.*, no costs which they would not have had to pay. The right to consolidate being now insisted upon, the Defendant insists that the whole of the mortgages—and the evidence shews there are six in all—shall be consolidated,

(1) 7 App. Cas. 345. (2) 8 Ch. D. 807.
(3) 1 J. & H. 336; 3 D. F. & J. 595.

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instead of the three which the Plaintiffs say they have a right to consolidate, and which may be three bad securities. Consequently, should the Court hold that the Plaintiffs have, after what they did, a right to consolidate, they should only be allowed to exercise it in respect of the whole six mortgages.

Hastings, in reply:—

The true relation of mortgagor and mortgagee was never altered. How could it be, by simply giving a notice which was to enable the Plaintiffs to put in force their statutory right? That was taking a step towards realizing their securities, if consolidation should become necessary. *Scarf* v. *Jardine* (1) has nothing to do with this case, for there was no inconsistency on the part of the Plaintiffs; and the language used in *Ex parte Adamson* (2) applies to this case.

1889. Nov. 14. STIRLING, J.:—

This was a summons taken out under Order LV., rule 5A, for the foreclosure of three mortgages, dated in 1876, 1882, and January, 1888. The third mortgage contains a clause negativing the application of the 17th section of the *Conveyancing and Law of Property Act*, 1881, and thus the Plaintiffs have, as they had before the passing of that Act, a right to consolidate the mortgages. By an indenture, dated in September, 1888, the equity of redemption in the property subject to the mortgage of January, 1888, was conveyed to the Defendant *Pound*. Subsequently the mortgagor became bankrupt. The clauses in the third mortgage would naturally put the assignee of the equity of redemption upon inquiry as to the existence of a right to consolidate; and it, in fact, appears from a letter which is in evidence, dated the 16th of January, 1889, from the solicitor of the Defendant *Pound* to the Plaintiffs' solicitors, that he was aware of the Plaintiffs' right. On the 27th of February, 1889, the Plaintiffs gave a notice to the Defendant *Pound* in the following terms: "We hereby give you notice to pay to us the principal money and interest due under and by virtue of an indenture of mortgage, dated the 25th day of January, 1888, and

(1) 7 App. Cas. 345. (2) 8 Ch. D. 807.

made between *Franklin Sydney King* of the one part, and *Walter Tuckfield Goldsworthy* and *John Thomas Griffiths* of the other part (being a mortgage of No. 108, *Fenchurch Street*, in the city of *London*, to secure the sum of £14,200 and interest), at the expiration of three months from the date hereof." Similar notices were shortly before that date given to the trustee in the bankruptcy of the mortgagor with reference to the property which was comprised in each of the other two mortgages. It is not proved, or at all events there is no evidence on which I can rely, that that fact was known to the Defendant *Pound* or to his solicitor. After the notice of the 27th of February, 1889, had been received by the Defendant *Pound*, a correspondence took place between him and his solicitor and the solicitors of the Plaintiffs. That correspondence related to various matters, and it must have been obvious to the Plaintiffs' solicitors from it that the Defendant *Pound* was engaged in making arrangements for paying off the mortgage of the 25th of January, 1888. On the 13th of May, 1889, the Defendant *Pound's* solicitors wrote thus: "I shall be glad if you will produce the deeds relating to the above premises to Messrs. *Barnes & Pears*, on their making an appointment. Please also to send me an account of what you have received and paid in respect of the property, that everything may be in order for completion." On the 14th of May the Plaintiffs' solicitors wrote back: "We shall be pleased to produce the deeds as you desire. We will also make out an account of the rents received, and forward the same to you." On the 21st of May there was another letter from the Defendant's solicitor: "Will you let me have the abstract of leases and agreements I asked for?" And on the same day (21st of May) the Plaintiffs' solicitors wrote: "We are in receipt of your letter, and will prepare the abstract of title as quickly as possible." On the 23rd of May the Defendant's solicitor wrote: "I have not heard from you, with the abstracts and accounts, as promised. I am told that my client received the notice on the 28th, and I therefore presume that the 28th will be the date for completion. I must now inform you that I cannot possibly complete until I know the amount to be paid—and this I cannot do until I have seen the promised account and had an opportunity of checking

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it." On the 25th of May the Defendant's solicitor wrote: "I beg to inform you that I shall attend at your offices on Monday next, the 27th instant, at 12·30 o'clock, for the purpose of paying the principal, interest, and all costs, including costs of transfer or reconveyance owing by Mr. *Pound* in respect of the mortgage of the above property, and in pursuance of the notice served by you, on behalf of the mortgagees, on the 27th of February last. Please be prepared to hand to me the securities." On the same day (the 25th of May) the Plaintiffs' solicitors wrote thus: "Since the notice referred to by you was given, the persons entitled to the equity of redemption in the other mortgages made to our clients by the mortgagor under whom you claim have failed to comply with the notice to pay, as you are probably aware. If you are prepared to pay off the principal and interest which our clients are entitled to consolidate with that due on the one, the subject of your letter, we will get the requisite authority from our clients to receive the money or arrange for payment to a joint account of the mortgages to a bank." Upon that the summons was taken out. Upon the return of it the Defendant *Pound's* solicitor attended in Chambers on his behalf, and made an offer which was refused, and the summons was thereupon adjourned into Court, the Defendant *Pound's* solicitor objecting that the right claimed by the Plaintiffs to consolidate could not be exercised.

The defence was, that the Plaintiffs had irrevocably elected not to avail themselves of the exercise of the right of consolidation which they were entitled to; and in support of the argument for the Defendant I was referred to a passage in the speech of Lord *Blackburn* in the case of *Scarf* v. *Jardine* (1), where his Lordship said: "The principle, I take it, running through all the cases as to what is an election is this, that where a party in his own mind has thought that he would choose one of two remedies"—I stop there for a moment to remark on the word "remedies," because to my mind it is not here a case of the election of remedies. The remedies are the same—they are sale or foreclosure, and in either case the remedy is the same. The question is as to the amount in respect of which the remedy is to be

(1) 7 App. Cas. 360, 361.

exercised. However, I pass that by for a moment, and continue what was said by Lord *Blackburn*: "one of two remedies, even though he has written it down on a memorandum or has indicated it in some other way, that alone will not bind him; but so soon as he has not only determined to follow one of his remedies but has communicated it to the other side in such a way as to lead the opposite party to believe that he has made that choice, he has completed his election and can go no further."

I stop there to observe that that does not fit the circumstances of the present case at all. That applies to the case of a man who has made up his own mind that he will pursue one of the two remedies. Treating this as a question of remedy, it never entered into the thoughts of the Plaintiffs or their advisers, when that notice was given, that they were thereby electing to abandon the right which they had to consolidate. The notice of the 27th of February, 1889, was given altogether with a different intention. The object of it was to fix the time at which a default would commence, so as to entitle the Plaintiffs to put in force the remedy by sale conferred by the *Conveyancing and Law of Property Act*, 1881. Therefore, that part of the case does not apply, on the ground that it was not a determination by the Plaintiffs to choose one of two remedies. Further than that, it also failed on the other ground, because there must be an indication given by one side in such a way as to lead the opposite party to a belief that a choice had been made. It is singular that there is not a word of evidence to shew that the Defendant or his advisers considered that by the notice the Plaintiffs had made an election, and determined not to prosecute the remedy of consolidation. On both grounds, therefore, the passage in the speech of Lord *Blackburn* so far appears to be inapplicable.

Then Lord *Blackburn* went on to say: "And whether he intended or not, if he has done an unequivocal act—I mean an act which would be justifiable if he had elected one way, and would not be justifiable if he had elected the other way—the fact of his having done that unequivocal act to the knowledge of the persons concerned, is an election." Then, I ask, did the service of the notice of the 27th of February, 1889, constitute an unequivocal act—I am not speaking of anything which followed it—but

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did the mere service of that notice constitute such an unequivocal act as was referred to by Lord *Blackburn*? Before I decide that, I desire to consider for a moment what the nature of the right of consolidation is. That was briefly explained by Lord *Selborne*, in the case of *Jennings* v. *Jordan* (1), where his Lordship said (2): "A mortgagee, who holds several distinct mortgages under the same mortgagor, redeemable, not by express contract, but only by virtue of the right which (in English jurisprudence) is called 'equity of redemption,' may, within certain limits, and against certain persons (entitled to redeem all or some of them), 'consolidate' them, that is, treat them as one, and decline to be redeemed as to any, unless he is redeemed as to all. This doctrine of consolidation is well established, and cannot now be altered except by the Legislature, whether it originally rested on a sound equitable foundation or not. The present question is as to its proper limits. There is no difficulty in its application when all the mortgages, whether originally made to the same mortgagee or having come into a single hand by subsequent assignments, are redeemable at the same time by the same person. Its extension to a case in which, after that state of things has once existed, the equities of redemption have become separated by the act of the person in whom they had been combined, though it may, perhaps, be open to objection on some practical grounds, rests upon an intelligible principle. The purchaser of an equity of redemption must take it as it stood at the time of his purchase, subject to all other equities which then affected it in the hands of his vendor; of which the right of the mortgagee to consolidate his charge on that particular property with other charges then held by him on other property at the same time redeemable under the same mortgagor was one. The mortgagee cannot lose that right, because the mortgagor thinks fit to separate the equities of redemption. The two mortgages having already become virtually one, the purchaser of part of the equity of redemption is no more entitled to escape from this position, than the present plaintiffs would have been to redeem the cottages only, without also redeeming the rest of the copyhold property included in *Merrett's* mortgage." That is to say, it stands on

(1) 6 App. Cas. 698. (2) 6 App. Cas. 700, 701.

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the same footing as if the whole property were included in one mortgage—as if there was one mortgage of the entire property included in the several properties for the total amount which is due on the whole of the mortgages. In order to see what the answer ought to be to the question which I have just put, let me suppose this case, which is a simpler one, that only one mortgage existed, and that the mortgagee, giving a notice for the same purpose as that for which it was given in this particular case, named the sum which was due under it, and by mistake named it at too small an amount, would he thereby have been precluded from claiming, when the time came for handing over the deeds, that which was actually due to him? I confess I cannot see why he should have been precluded. I am assuming that nothing more has taken place than the service of the notice, and it seems to me that the service of it alone would not preclude him from claiming what was justly due to him when he discovered the mistake; and, indeed, the passage which was cited in argument by Mr. *Rigby*, in *Ex parte Adamson* (1), goes a long way to shew that that is so. Lord Justice *James* said (2) in that case: "Nobody ought to be estopped from averring the truth or asserting a just demand, unless by his acts or words or neglect his now averring the truth or asserting the demand would work some wrong to some other person who has been induced to do something, or to abstain from doing something, by reason of what he has said or done, or omitted to say or do." In the hypothetical case which I have put, a notice fixing too small an amount for the repayment is given, the notice being given, not for the object of defining the amount which was to be paid, but of fixing the time at which default would take place, it seems to me that those observations would apply, and that when the time came for reconveyance, the mortgagee would not be precluded simply by the fact of having given the notice from claiming what was justly due to him. Then, that being so, in the simple case which I have put, it seems to me that, having regard to what was laid down by Lord *Selborne*, in the case of *Jennings* v. *Jordan*, the right of consolidation stands upon the same footing. He has mentioned in his notice something less than he was entitled to

(1) 8 Ch. D. 807. (2) 8 Ch. D. 817, 818.

STIRLING, J. claim. I hold that just as if there had been one mortgage, and he had claimed too little by his notice, he was not precluded by the notice alone from asserting his true and just demand.

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I have to consider next whether anything has taken place which would further affect the case—whether by asserting the demand some wrong would be worked to some person who has been induced to do something, or abstain from doing something by reason of what the Plaintiffs have said or done. Now, what was relied on for that purpose was the alleged expenditure by the Defendant *Pound* towards procuring a transfer of the mortgage. In the first place, there was no actual evidence of the expenditure. There are facts which appear from which, I think, I may not unreasonably infer that expenditure to some extent had been incurred, though how great I do not know; I have no knowledge whatever of the amount of the expenditure. But that is not enough. If I am to come to the conclusion that by reason of that expenditure the Defendant's position has been altered, and that wrong would be done to him by the assertion of the right, it seems to me that the Defendant *Pound* must prove two things more at least—I do not say that that would be enough—but two things at least he ought to prove: first, that he was misled by the notice; and, secondly, that he has expended an amount beyond what he would have done if he had not been so misled. Now, as to those matters the evidence is entirely silent. It seems to me, therefore, that the case which was proposed to be set up fails on the evidence. I am not to be understood as saying if those were proved it would not be necessary for the Defendant to prove something more. It is needless to go into that, as I hold that the case which was attempted to be set up has not upon the evidence been made out; and I think, therefore, that the defence fails, and must be overruled.

Then it was said that the Plaintiffs were the holders, not merely of three mortgages, but of six, and that the Defendant is entitled to redeem them all. That was not contested, as I understand, by the Plaintiffs. They are willing to give effect to that contention of the Defendant; and therefore the order, the Plaintiffs being willing and the Defendant requiring it, must be for an account of what is due on the six mortgages, and not merely on the three.

There still remains the question of costs. Of course, the costs in the ordinary course would be dealt with in the usual way, viz., costs of the foreclosure; but I am asked for a personal order against the Defendant in respect of two matters, viz., the adjournment into Court, and of a certain cross-examination which has taken place. As regards the costs of the adjournment into Court, I do not think it would be right that I should deviate from the usual course, and I do not, therefore, propose to make a personal order. As regards the costs of the cross-examination, I am bound to say that, having looked at it, I do not think it resulted in anything useful. It was suggested by Mr. *George Henderson* that the Defendant thereby became acquainted with the existence of the three additional mortgages. But they were referred to in the affidavit of the Defendant's solicitor which had been filed before the cross-examination took place; and I am not at all satisfied, when I look at the cross-examination, that if an application by letter had been made to the Plaintiffs' solicitors they would not readily have conceded that which was conceded at the bar. It does seem to me that the cross-examination was in the nature of an abuse, and that the costs of it ought to fall upon the Defendant. The declaration will be that the Plaintiffs are entitled to consolidate the six mortgages.

George Henderson :—

The position of the Defendant is simply this: Upon the Plaintiffs' summons they are not entitled to the order which they have asked for, because there are six mortgages instead of three, and it is submitted that they must put the summons right. It being clear upon the evidence that there are six, and not merely three mortgages, the Plaintiffs are not entitled to an order for foreclosure as regards the three only.

Hastings :—

Mortgagees who come for foreclosure may do what they like, and the Defendant cannot dictate to them what mortgages they should foreclose and what not. The Defendant could always have taken his own proceedings to redeem if he had thought fit to do so, and he in fact did take such proceedings.

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In my opinion, it will be necessary to amend the summons and bring all the other parties before the Court. I will give leave to amend by adding parties. I cannot make any decree now. All that I can do at the present moment is to make a declaration that the Plaintiffs are entitled to consolidate the mortgages.

1890. April 30. The summons of the Plaintiffs having been amended, came on to-day to be heard again. They now claimed to foreclose the six mortgages, all of which had been executed by *F. S. King* in their favour. The mortgages Nos. 1 and 2 contained properties which were insufficient securities, and the Defendant *Harper*, the trustee in the bankruptcy of *F. S. King*, had disclaimed the equities of redemption. The Defendant *Pound* had, as above stated, purchased the equity of redemption in No. 3 mortgage, and the Defendants, the *Billiter Street Offices Company, Limited*, had purchased the equity in the No. 5 mortgage, and the company had issued debentures for a large amount charging this and other properties. Two of the debenture-holders were by the summons as amended made Defendants; and by an order dated the 18th of January, 1890, made on a summons heard in Chambers, they were authorized to defend on behalf of themselves and the other debenture-holders, pursuant to Rules of Supreme Court, 1883, Order XVI., rule 9.

Hastings, Q.C., and *Ingle Joyce*, for the Plaintiffs, asked for an order for foreclosure against the Defendants *Pound* and *Harper* alone, and submitted that if the Defendant *Pound* did not redeem he should be ordered to pay the costs of the company and of the debenture-holders on the ground that they had been made Defendants because he stated on the former hearing of the summons that he desired to redeem all the six mortgages.

Swinfen Eady, who appeared for the debenture-holders, and *Chadwyck Healey* for the *Billiter Street Offices Company, Limited*, supported that contention.

Talbot K. Crossfield, for the Defendant *Harper*, and *F. W.*

Pember, for the Defendant *Humphreys*, the second mortgagee of No. 2 mortgage.

George Henderson, for the Defendant *Pound*, submitted that in the absence of the other debenture-holders no order for foreclosure could be made. The only way of working out the equities of all parties would be to direct that all the six properties mortgaged should be sold, and the deficiency on the sale of the properties contained in Nos. 1 and 2 mortgages should be made good out of the proceeds of sale of the others rateably. He contended, that as the Defendant *Pound* had never agreed to pay any of *F. S. King's* debts, except as to the mortgage No. 3, he was entitled to have all the surplus proceeds of Nos. 4 and 6 applied to make good the deficiency of Nos. 1 and 2 before any contribution from the surplus proceeds of No. 3. The Defendant *Pound* could not obtain a sale except under sect. 25, sub-sect. 2, of the *Conveyancing and Law of Property Act*, 1881, and the language of that section shewed that his application would not be entertained until all persons having an equity to redeem were made Defendants. The parties who had been added to the summons were not made Defendants at his request, but because the Plaintiffs' summons was defective without them; therefore he should not be made to pay the costs asked for.

STIRLING, J.:—

This case has assumed a very singular position. First of all, I will deal with the question of costs, and it would, in my opinion, be unjust to make an order as against Mr. *Pound* in respect of any costs beyond those which he has already been ordered to pay. The case stands thus:—The summons was originally directed to the foreclosure of three mortgages only. The right to foreclose the three mortgages as against Mr. *Pound* was resisted by him. He said that he was entitled to redeem on paying what was due on one mortgage only. I decided that point against him. Then it was pointed out that the right to consolidate extended not only to the three mortgages which the Plaintiffs desired to foreclose, but also to three other mortgages; and the Defendant said that if the Plaintiffs insisted upon

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consolidating the three against him they must consolidate the six. That matter was not fully argued before me; but I confess that my impression was at the time that Mr. *Henderson's* contention was right, and that the Plaintiffs could only work out the action by consolidating, not merely the three, but the six mortgages. After some discussion the summons was ordered to stand over, with liberty to amend by adding parties. The summons has been amended by adding certain parties who claim under the mortgages which were not originally included in the summons. It is now a summons by the Plaintiffs to foreclose all the six mortgages, and it must be dealt with upon that footing. I do not see that anything has been done by Mr. *Pound*, or by those who represent him, in such a way as to make him liable for the costs of the persons who have been added by amendment. Now, I come to a difficulty which I feel to be very great, and none the less so because I am partly responsible for it myself. An application was made to me in Chambers to add two out of a large number of debenture-holders to represent the other mortgage debenture-holders; and pursuant to the rules of the Supreme Court, 1883, Order XVI., rule 9, I appointed two of them to defend in this action on behalf and for the benefit of the other mortgage debenture-holders of the *Billiter Street Offices Company, Limited.* An objection has been taken that an order for foreclosure cannot be made in an action so constituted. In my opinion that objection is well founded, and that an order for foreclosure cannot be made without having here all the persons interested in the equity of redemption. The Rules of the Supreme Court, Order LV., rule 5A, under which this proceeding was directed, state that "any mortgagee or mortgagor, whether legal or equitable, or any person entitled to or having property subject to a legal or equitable charge, or any person having the right to foreclose or redeem any mortgage, whether legal or equitable, may take out as of course an originating summons, returnable in the Chambers of a Judge of the Chancery Division, for such relief of the nature or kind following as may by the summons be specified, and as the circumstances of the case may require"; that is to say, foreclosure and so forth. Rule 5B states: "The persons to be served with

the summons under the last preceding rule shall be such persons as under the existing practice of the Chancery Division would be the proper defendants to an action for the like relief as that specified by the summons."

In an action for foreclosure, unquestionably according to the rules of the Chancery Division all persons interested in the equity of redemption ought to be defendants. That is, limited only, as has been pointed out by Mr. *Henderson*, by this:—That a statute was passed (15 & 16 Vict. c. 86, s. 42) to the same effect as is the subsisting rule 8 of Order XVI.: "Trustees, executors, and administrators may sue and be sued on behalf of or as representing the property or estate of which they are trustees or representatives, without joining any of the persons beneficially interested in the trust or estate, and shall be considered as representing such persons; but the Court or a Judge may, at any stage of the proceedings, order any of such persons to be made parties, either in addition to or in lieu of the previously existing parties." With reference to that, it has been held that where the second mortgagee is a trustee, he does not, for the purposes of a foreclosure action, represent the *cestuis que trust*, and that the *cestuis que trust* must, notwithstanding rule 8 of Order XVI., be necessarily parties to the action. That was decided in *Francis* v. *Harrison* (1). It follows, therefore, that that rule does not apply even when the defendants to the foreclosure action are trustees. Here we have no trustees; but what has been done is this, an order has been made under the rule relating to numerous parties, viz., Order XVI., rule 9, which provides that "where there are numerous persons having the same interest in one cause or matter, one or more of such persons may sue or be sued, or may be authorized by the Court or a judge to defend in such cause or matter, on behalf or for the benefit of all persons so interested." I made the order at Chambers under that rule; and at the time when I made it I was under the impression, rightly or wrongly, that the accounts might be taken in the presence of a certain number of the persons interested in the equity of redemption so as to bind the rest to the finding of the amount due on the account; but I confess that I do

(1) 43 Ch. D. 183.

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not see how the foreclosure action can be completely worked out unless all the persons who are interested in the equity of redemption are brought before the Court. If the parties are desirous on this occasion to take the account of what is due upon the Plaintiffs' mortgages simply in the way of a preliminary account, leaving it open hereafter to add the other parties—as may be done, I think, when merely preliminary accounts are directed —interested in the equity of redemption, and bring them before the Court when that account is taken, I am willing to make an order to that extent; but it would be an order simply to take the preliminary account. I conceive that I cannot make a complete foreclosure order or anything equivalent to it in an action framed as this is. All I can do is to direct the preliminary account in order to ascertain what is due on the Plaintiffs' mortgages, making the order in such a way as to leave it open at a later stage to add all the necessary parties to the action.

Hastings:—I think I should prefer to make all the debenture-holders parties, and take the accounts and foreclose (as we desire to have foreclosure) as soon as possible. Therefore, the proper order will be for the summons to stand over generally with liberty to amend by adding parties, and to be restored to the paper immediately after the Plaintiffs have been before the Chief Clerk.

STIRLING, J.:—

Yes; let the summons stand over to enable that to be done.

Solicitors: *Grover & Humphreys; Wm. Negus; Stanley & Woodhouse; W. J. Crossfield.*

T. F. M.

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1890
May 3.

In re WELLS.
MOLONY *v.* BROOKE.

[1890 W. 1241.]

Practice—Receiver—Creditors' Administration Action—Executor—Right of Retainer.

The Court will not interfere with an executor's right of retainer by appointing a receiver at the instance of the Plaintiff in a creditor's administration action merely because the executor will probably exercise his right to the prejudice of the general body of creditors, nor unless it is shewn that the assets are being wasted.

THE testator, Mr. *W. M. Wells* of *Holme*, who died on the 1st of May, 1889, by his will appointed Lord *Brooke* and Admiral *Wells* his executors, and made them the trustees of his real estate. At the time of the testator's death Admiral *Wells* was absent on foreign service, and Lord *Brooke* alone proved the will.

The testator was entitled to an estate in the county of *Huntingdon* called the *Holme Wood*, comprising from 6000 to 7000 acres, which estate was heavily incumbered, and one of the incumbrances was a mortgage debt of £120,000, which was owing to Lord *Brooke* and Admiral *Wells*, as the trustees of the will of Mr. *William Wells* of *Redleaf*, the great-uncle of the testator, under which will Mr. *Hubert Wells* was entitled to the *Redleaf* estate subject to the life interest of his father, Captain *G. G. Wells*.

The testator, Mr. *Wells* of *Holme*, was also possessed of personal estate of considerable amount, including the above-mentioned life interest of Captain *G. G. Wells*, which he had acquired by purchase.

After the death of Mr. *Wells* of *Holme*, a creditors' action for the administration of his estate was brought by Colonel *Molony*, one of his mortgagees and creditors; and on the 25th of April, 1890, the Plaintiff in this action moved *ex parte* before Mr. Justice *Stirling* for the appointment of a receiver of the testator's personal estate, with the view of preventing the Defendants, Lord

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Brooke and Admiral *Wells*, from exercising their right of retainer as to the above-mentioned mortgage debt of £120,000. Upon the hearing of this motion the Defendant, Lord *Brooke*, did not oppose the appointment of a receiver, but stated through his counsel that he had been required by his *cestui que trust*, Mr. *Hubert Wells*, to exercise his right of retainer in favour of such *cestui que trust*, and that Mr. *Hubert Wells* had on the 28th of April taken out an originating summons to have the question arising as to the retainer determined by the Court. The Court, under these circumstances, made the order for a receiver on the terms that the Plaintiff should accept from Mr. *Hubert Wells* service of notice of motion; and Mr. *Hubert Wells*, who together with certain other persons had since been added as Defendants to the action, now moved to discharge that order.

Sir *H. Davey*, Q.C., *Rigby*, Q.C., and *Swinfen Eady*, in support of the motion:—

No sufficient ground has been shewn for the appointment of a receiver. The executor's right of retainer is a legal right with the exercise of which the Court will not interfere. There is no suggestion that the assets are being wasted, or are in peril in any way, and the only object of the motion is to prevent an executor who is also a trustee from exercising his legal right in favour of his *cestui que trust*. In the circumstances of this case it would be a breach of trust on the part of Lord *Brooke* to give up his legal right of retainer. [They cited or referred to *European Assurance Society* v. *Radcliffe* (1); *Philips* v. *Jones* (2); *Judicature Act*, 1873, sects. 18 and 25; *Harris* v. *Harris* (3); *Sander* v. *Heathfield* (4); *In re Hubback* (5); *In re Jones* (6); *In re York* (7).]

Hastings, Q.C., and *Fossett Lock*, for the Plaintiff:—

This is a creditors' action, and the Plaintiff is entitled to the assistance of the Court in obtaining a due and equal distribution of the estate. The Plaintiff is as much a *cestui que trust* of the

(1) 7 Ch. D. 733.
(2) 28 Sol. J. 360.
(3) 35 W. R. 710.
(4) Law Rep. 19 Eq. 21.
(5) 29 Ch. D. 934.
(6) 31 Ch. D. 440.
(7) 36 Ch. D. 233.

executors as Mr. *Hubert Wells*. There is no authority against the order that has been made, for the cases of preference that have been cited do not apply, and where an order for a receiver has been made in favour of one creditor and without opposition by the executors, the Court will not discharge it at the instance of another creditor.

STIRLING, J. 1890 *In re* WELLS. MOLONY *v.* BROOKE.

[They referred to *Richmond* v. *White* (1), and *Talbot* v. *Hope Scott* (2).]

Buckley, Q.C., and *Onslow*, for Lord *Brooke*.

STIRLING, J.:—

This is an application to discharge an order which I made last week for the appointment of a receiver of the estate of *William Wells*, late of *Holme*, in the county of *Huntingdon*. The action is brought by a creditor on behalf of himself and all other creditors against the legal personal representative of the testator and against a trustee of the will who is named as an executor but has not proved. These were the only Defendants, I believe, when the order was made; but since then other persons, including the present applicant, have been added as Defendants, and are now parties to the action. I do not discharge the order which I made, as I said, yesterday week, on the ground that any of the parties to the proceedings were guilty of any impropriety when they came here and asked for the appointment of a receiver, or that they withheld anything from the Court of which the Court ought to have been informed. Certainly, as far as regards what took place in Court, there was no impropriety whatever, because I was informed by the learned counsel engaged of all the facts which appear to me now on this hearing really material to the decision of the case, and nothing that I can see was kept back. The application was one for a receiver, and I was informed on the one hand that the executor was not unwilling, to say the least—perhaps I may go as far as to say was willing—that the receiver should be appointed; but, on the other hand, that he could not consent, because the present applicant insisted that the right of retainer legally vested in him, the executor, should

(1) 12 Ch. D. 361. (2) 4 K. & J. 96.

STIRLING, J. 1890 *In re* WELLS. MOLONY *v.* BROOKE.

be exercised in his favour, and that, further, a summons had been taken out by the present applicant for the purpose of enforcing that right. Under these circumstances, seeing that the executor was not unwilling that the assets of the testator should be distributed in the manner which is favoured, if I may say so, by a Court of Equity where lawfully it can be done—that is to say, in such a way as to produce equality among the various creditors—I thought the best course to take was to appoint a receiver, and at the same time to protect the interests of the then absent party by imposing a term upon the Plaintiff in the action that he should accept short notice of motion to discharge the order which I made. I did not make that order altogether without consideration; but I am bound to say now, having further considered the matter and heard the arguments, I think I should have done better if I had simply directed the motion to stand over in order that the present applicant might be brought here. However, the present applicant immediately gave notice of motion. An application was made to me to stay the completion of the order until this motion was heard, and the order has not been completed, still less has anything been done under it, and the position of the assets is precisely the same at this moment as it was yesterday week when the order was made, and no party has as yet been prejudiced. Now, I have to consider whether really it is right and proper that a receiver should be appointed on the present occasion.

The position of matters is this. The Defendant, Lord *Brooke*, who is the legal personal representative of the testator, has vested in him and Admiral *Wells*, as trustees of the settlement, a debt due from the testator's estate. The beneficiaries under the settlement, of which Lord *Brooke* and Admiral *Wells* are trustees, say this: "You, Lord *Brooke*, by virtue of your position of executor, have acquired at law the right of retaining out of the legal assets of the testator the debt which is legally due to you, and we insist that that legal right you shall use for our benefit;" and they have taken out a summons in this branch of the Court for the purpose of having that question determined.

That summons is not ripe for hearing; but it is obvious that there is a question to be considered upon it, and it is not right

that anything should be done to prejudice the position of the present applicant until that question is determined.

Now, the effect of appointing a receiver is this, that the assets will be intercepted before they reach the hands of the executor, and it may be—I do not say necessarily that it will be—that by that means assets which would otherwise be applicable in payment of the debt due to the trustees of the settlement will be prevented from being so applied.

The present applicant, therefore, has an interest in seeing that no order is made which would prejudice the right which he claims, and he comes here and says that no sufficient ground has been shewn for the appointment of a receiver. Now, the state of matters is this—the appointment of the receiver was not made by consent. The executor expressly says that he is very willing to submit to the appointment of a receiver, and is very willing to abstain from exercising his right of retainer if he can properly do so, but that while this question is pending between him and the beneficiaries under the settlement of which he is a trustee he cannot consent to any order which would prejudice their rights; therefore, he does not consent, and the order cannot be treated as a consent order. The only question is whether any ground other than that of consent can be shewn for obtaining the order. Now it is admitted, and it is common ground to all parties, that Lord *Brooke* has not been guilty of any impropriety as regards the assets; he has not wasted them or done anything which is wrong in any way, and the only question which appears to me to arise is this, whether it is right and proper that a receiver should be appointed simply on the ground that Lord *Brooke* may exercise the legal right of retainer which is vested in him to the prejudice of the general creditors of the testator. The question in that precise form does not seem to have been the subject of decision; but there are certain decisions which have been referred to which appear to me to indicate clearly the course which I ought to take under the circumstances. In the case of *European Assurance Society* v. *Radcliffe* (1) it was decided by the late Master of the Rolls that "where an executor or administrator, after the commencement of a creditors' administration

(1) 7 Ch. D. 733.

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action and before judgment, has voluntarily paid any creditor in full, the rule in Equity and not at law must now prevail, under *Judicature Act*, 1873, s. 25, sub-s. 11, and he will accordingly be held to have made a good payment, and will be allowed it in passing his accounts, even though he may have had notice of the action before payment." That decision has been recently followed by the Court of Appeal.

But the Master of the Rolls at the conclusion of his judgment said this: "The only way to prevent such payments being made is by the plaintiff, upon issuing the writ, immediately applying for and obtaining a receiver." That was *dictum* only; but I believe that I am right in saying that upon that *dictum* many applications for receivers were made, and were acceded to both by the late Master of the Rolls, and also by other Judges of the Chancery Division, and that in none of these cases was any resistance offered to the application. But that came to an end upon a decision of the Court of Appeal in the year 1884 in the case of *Philips* v. *Jones* (1). There the application was made for the appointment of a receiver to the Vice-Chancellor of the County Palatine of *Lancaster*, and the only ground alleged for asking for a receiver was that the executors would not admit assets, and that they would be entitled according to the settled rule in Equity before judgment in the action to pay in full any creditor whom they might choose to prefer. Reliance was placed on the power given to the Court by sub-sect. 8 of sect. 25 of the *Judicature Act*, 1873, to appoint a receiver by an interlocutory order in all cases in which it shall appear to the Court to be just and convenient that such order should be made; and on the observation made by *Jessel*, M.R., in *European Assurance Society* v. *Radcliffe* (2). Vice-Chancellor *Bristowe* declined to appoint a receiver, and the Court of Appeal (Lord Justices *Cotton*, *Bowen*, and *Fry*) affirmed the decision. The Court said "that sub-sect. 8 of sect. 25 of the *Judicature Act* only gave the Court power to appoint a receiver in aid of existing rights. The words 'just and convenient' must be construed with reference to the existing law of the country. To accede to the present application would amount to a reversal of the decision of the House of

(1) 28 Sol. J. 360. (2) 7 Ch. D. 733.

Lords in *Darston* v. *Lord Orford* (1), which established the right of an executor to pay a creditor in full, after the institution of a suit to administer the testator's estate, but before decree. The observations of Sir *George Jessel*, M.R., in *European Assurance Society* v. *Radcliffe* (2) were only *dicta*, not necessary to his decision in that case; if they were intended to be a decision that in any creditor's administration action, without making any special case, merely because that executor would not admit assets, a receiver would be appointed, they were inconsistent with the course of authority." The matter does not rest there, because in the case of *Harris* v. *Harris* (3) an application was made to Mr. Justice *Chitty* for the appointment of a receiver on the like grounds, and what his Lordship said was this: "The principle is, that a plaintiff in an administration action is only entitled to interim relief against the administrator or executor when a case is shewn of assets being wasted. The law allows the administrator or executor to prefer one creditor to another, and there is no equity which entitles the Court to interfere, except after judgment for administration. That is the law and it is a curious state of things, and I do not say that I approve of it. I cannot, however, accede to the plaintiff's application, nor do I think that he would fare better in the Court of Appeal. I will, however, if the plaintiff still desires it, give leave to serve short notice of motion."

There the matter stopped; but that is a clear statement by the learned Judge of the principle on which these applications ought to be dealt with. It is that the plaintiff in the administration action is only entitled to relief against the administrator or executor when a case is shewn of assets being wasted. Now, here there is no such case made. Then it is said that these cases only relate to the preference by an executor or administrator of one creditor to another, and that here I have to deal with the right of the executor to retain for his own debt. No doubt that is a difference, and it is a substantial difference, because although the judgment for administration would interfere with the executor's right to prefer one creditor to another, it

(1) Prec. in Ch. 188; Colles, 229. (2) 7 Ch. D. 733.
(3) 35 W. R. 710.

STIRLING, J. 1890 *In re* WELLS. MOLONY *v.* BROOKE.

does not interfere with the executor's right of retainer; therefore there is a substantial difference between the two. But it seems to me that in principle one case governs the other. The Court of Appeal, in *Philips* v. *Jones* (1), say that the legal right of an executor to prefer one creditor to another ought not to be interfered with. It seems to me that in like manner I ought not to interfere with the legal right of the executor to retain in satisfaction of his own debt. In coming to that conclusion in the present case I feel strongly that if I abstain from appointing a receiver the general creditors are not likely to be prejudiced, whereas if I do continue the present order, and appoint a receiver, the applicants in this case may be prejudiced. As I have already pointed out, by the appointment of a receiver assets applicable for the payment of the applicant's debt may be diverted from the hands of the executor; whereas if the assets are allowed to come to the hands of the executor he is not thereby precluded at the proper time from asserting his right of retainer, and there is every ground to believe that he will, if he can do so, exercise it in favour of the general creditors who are represented by the Plaintiff.

I think, therefore, that with the view of keeping the matter *in statu quo*, and not prejudicing any right, I ought to discharge the present order; but, for the sake of saving expense, I will allow the motion to be again brought on after the decision upon the summons which has been taken out by the present applicant. As regards costs, it seems to me I should be doing justice if I made them costs in the action.

Solicitors: *Hasties; H. A. Dowse; Frere & Co.*

(1) 28 Sol. J. 360.

W. W. K.

THYNNE *v.* SHOVE.

STIRLING, J.

1890

May 22.

[1890. T. 891.]

Vendor and Purchaser—Sale of Business—Assignment of Goodwill to Purchaser—Right of Purchaser to use Vendor's Name.

The Plaintiff, *A. Thynne*, sold his business of a baker, and the goodwill thereof, to the Defendant, who also bought, at a valuation, his stock-in-trade, which included trade cards bearing the name of "*A. Thynne*, Baker."

The deed by which the purchase was carried out contained an assignment of "all the beneficial interest and goodwill of the said *Arthur Thynne* in the said trade or business;" but it contained no express assignment of the right to use the Plaintiff's name.

After the purchase the Defendant used the trade cards bearing the Plaintiff's name until they were exhausted, and then printed further trade cards bearing the Plaintiff's name as before.

In an action by the Plaintiff to restrain the Defendant from printing or publishing any such cards, or otherwise trading in the name of the Plaintiff:—

Held, that the Defendant, by virtue of the assignment to him of the goodwill of the business, was entitled to use the name of the Plaintiff for the purpose of shewing that the business was that formerly carried on by the Plaintiff, but must not so exercise that right as to expose the Plaintiff to liability; and *held*, that, under the circumstances, an injunction must be granted to restrain the Defendant from using the Plaintiff's name in such a way as to expose him to any liability.

Levy v. *Walker* (1) and *Gray* v. *Smith* (2) discussed.

In March, 1890, *Arthur Thynne* entered into a contract with *Harold Shove* to sell to him, as a going concern, the business of a baker and pastrycook, which the vendor, and his father before him, had for over fifty years carried on at *Tranquil Vale*, in the village of *Blackheath*, together with the leasehold messuage and premises in which the business was carried on, and the goodwill of the business.

The sale was carried out by an indenture dated the 26th of April, 1890, whereby *Thynne* assigned to *Shove* the leasehold messuage and premises, No. 44, *Tranquil Vale*, in which the business was conducted, and also "All the beneficial interest and goodwill of the said *Arthur Thynne* in the said trade or business

(1) 10 Ch. D. 436. (2) 43 Ch. D. 208.

STIRLING, J. 1890 THYNNE v. SHOVE.

of a baker and pastrycook, so carried on by him as aforesaid"; but the deed contained no express assignment of the right to use *Thynne's* name. The purchase-money was £850, and under the conditions of sale *Shove* also purchased at a valuation the stock-in-trade, fixtures, fittings, and utensils of the business, which comprised a number of cards and paper bags on which *Thynne's* name appeared. On the cards was printed, "*A. Thynne*, Baker & Confectioner, The Village Bakery, *Blackheath*." *Shove* used these cards until they were exhausted, and then he had more printed, and proceeded to issue them. *Thynne* denied his right to do this, and brought an action against *Shove*, in which he claimed an order that all cards, billheads, and bags printed for the Defendant in the name of *Thynne* might be delivered up to him, and claimed also an injunction to restrain the Defendant from printing or publishing any such cards or documents, or otherwise using or trading in the name of the Plaintiff.

In his evidence the Plaintiff put his case thus:—

"On the 13th day of May inst., I discovered that the Defendant had issued cards in my name, by which he wished the public to understand that I was still carrying on business at 44, *Tranquil Vale* aforesaid. The Defendant has no right to use my name, and I strongly object to his so doing, as it will materially injure me if I start in business again at *Blackheath*."

The Defendant, in his evidence, made the following statement: "I deny that the Plaintiff can be materially or at all injured, as I deny his right to solicit any of the customers of the said business so purchased by me as aforesaid, and contend that I have a right to use the name of *Arthur Thynne* as a trade name."

The case came on upon motion by the Plaintiff for an injunction in the terms of his statement of claim; but by agreement the hearing of the motion was treated as the hearing of the action.

Hastings, Q.C., and *Bradford*, for the Plaintiff:—

The assignee of a business has no right to use the name of the assignor unless he is authorized in express terms to do so; and in this case the deed by which the business was assigned to the Defendant contains no such authority. It is true that it con-

tains an assignment of the goodwill of the business; but that does not entitle the Defendant to do what he has done, *i.e.*, to hold out, without any additional or qualifying words shewing himself to be the successor, that "*A. Thynne*" is still carrying on the business. By so doing he may involve the Plaintiff in liabilities, and possibly in litigation and loss: *Levy* v. *Walker* (1); *Gray* v. *Smith* (2).

Buckley, Q.C., and *Levett*, for the Defendant:—

The purchaser of a business and the goodwill thereof buys the benefit of any reputation which the vendor has gained during the time that the business has gone on.

The assignment of *Thynne's* business and goodwill carried with it the right to use *Thynne's* name. And such a right, in the words of *James*, L.J., in *Levy* v. *Walker* (3), "is an exclusive right as against the person who sold it, and an exclusive right as against all the world." There is nothing inconsistent with this in *Gray* v. *Smith*. If in assigning the beneficial interest and goodwill of the business the words, "together with the right to use the name of the said *A. Thynne*," had been added, that would not have carried the case any further. The Defendant is entitled to use the Plaintiff's name for all the purposes of the business; and as the Defendant buys all the goods he requires, and enters into all business contracts in his own name, the Plaintiff cannot sustain any injury or incur any liability.

Hastings, in reply:—

The Defendant, as the purchaser of the Plaintiff's business and goodwill, is no doubt entitled to use the Plaintiff's name for ordinary business purposes, but only so far and so long as he does not by so doing expose the Plaintiff to any liability whatsoever. All that was decided in *Levy* v. *Walker* was that the assignee of the goodwill may use the name of the assignor where the use of the name cannot possibly expose the real owner of it to any liability.

[He also referred to *Prudential Assurance Co.* v. *Knott* (4).]

(1) 10 Ch. D. 436.
(2) 43 Ch. D. 208.
(3) 10 Ch. D. 449.
(4) Law Rep. 10 Ch. 142.

STIRLING, J.

1890

THYNNE v. SHOVE.

STIRLING, J. :—

The question which has arisen in this case is an important one, and is not altogether covered by authority. [His Lordship then stated the facts and continued:—] This then is a case in which upon the sale of the business there was no express assignment of the right to use the name of the former owner of it. Upon the evidence before me, the grounds on which the Plaintiff puts his case are these: "I discovered on the 13th of May that the Defendant had issued cards in my name, by which he wished the public to understand that I was still carrying on the business at *Tranquil Vale* aforesaid. The Defendant has no right to use my name, and I strongly object to his so doing, as it will materially injure me if I start in business again at *Blackheath*."

That is thePlaintiff's case, and if that is taken literally it is far in excess of his rights. He has assigned the goodwill of his business to the Defendant; and by virtue of that assignment the Defendant, in carrying on the business, has the right to use the name of the assignor for the purpose of shewing that the business is the business formerly carried on by the assignor; and he has the full right so to use it, subject to this: that he must not exercise that right so as to expose the assignor to any liability by holding him out to be the real owner of the business. That is the only limit of the Defendant's right to use the Plaintiff's name. On the other hand, the Defendant in his evidence denies that the Plaintiff can be at all injured; and contends that he (the Defendant) has a right to use the Plaintiff's name as a trade name.

Upon that state of things the question arises, whether the Defendant is absolutely and without limitation entitled to use the Plaintiff's name, and, upon principle, I think that he ought not so to use it as to expose the Plaintiff to any liability. No case has ever been decided to the contrary. *Levy* v. *Walker* (1) has been relied on in argument. In that case Miss *Charbonnel* and Miss *Walker* carried on a business in partnership in *London*, under the name of *Charbonnel & Walker*. Miss *Charbonnel* married *Levy*; the partnership was dissolved, and the business and the goodwill were purchased by Miss *Walker*, who continued the

(1) 10 Ch. D. 436.

business under the name of *Charbonnel & Walker*, as before. On the other hand, Mr. and Mrs. *Levy* started a business in *Paris*, under the name of *Charbonnel et Cie.*, and sought an injunction to prevent Miss *Walker* from using the name of *Charbonnel & Walker* in *London*. The injunction was refused, partly, it is clear, on the ground that Miss *Walker* put the plaintiffs under no possible liability by so carrying on the business. In that case, *Jessel*, M.R., said (1): "The plaintiffs are under no liability by reason of Miss *Walker* so carrying on the business. The plaintiffs are not actual partners in the firm of *Charbonnel & Walker*; the dissolution decreed by the Court has been duly advertised, and no person dealing with Miss *Walker* for the first time can make Mr. or Mrs. *Levy* liable. . . . . What conceivable interest the plaintiffs have in the question as to the firm name under which Miss *Walker* chooses to carry on the business, I have been unable to ascertain."

James, L.J., no doubt expressed an opinion upon a point to which *Jessel*, M.R., did not refer, though he did not say that he held a contrary opinion to that of the Master of the Rolls. What he said was this: "But there is another point upon which I myself cannot entertain any doubt, which is this, that the assignment of the goodwill and business of *Charbonnel & Walker* did convey the right to use the name of *Charbonnel & Walker*, and the exclusive right to use that name as between the vendor and the purchaser of that business. Whether it would prevent another person from afterwards using the name of *Charbonnel*, I do not say; but the trade name, made up of parts of two real names, as the Master of the Rolls says—the trade name of *Charbonnel & Walker* (whether it was entirely a fictitious name can make no difference)—was the name of the business, and that business was sold. That was a name, with which every article sold might have been impressed, just as in the case of *Millington* v. *Fox* (2), where the name was continued as part of the designation of the article sold. I think it right to say that the sale of the goodwill and business conveyed the right to the use of the partnership name as a description of the articles sold in that trade, and that that right is an exclusive right as against the

(1) 10 Ch. D. 447, 448. (2) 3 My. & Cr. 338.

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person who sold it, and an exclusive right as against all the world, so that no other person could represent himself as carrying on the same business."

But in that case it is important to observe that the names of "*Charbonnel & Walker*" were not the real names of any two persons who were carrying on the business. It was in reality a fancy name. And that is an entirely different case from one in which the use of a name would expose a former owner of the business to liability. There the consideration that there was no Miss *Charbonnel* in existence who could have been liable by the use of her name was a very important one; and *James*, L.J., does not say that if a person were using the name of his assignor so as to expose him to liability the assignor would not be entitled to relief. That, in my opinion, is the true view of *Levy* v. *Walker* (1), and it is confirmed by *Gray* v. *Smith* (2), where Lord Justice *Cotton* says (3): "Mr. and Mrs. *Levy* could not be subjected to any liability by the use of the name of '*Charbonnel & Walker*' by the defendant;" and he points out elements in *Levy* v. *Walker* which were not to be found in the case then before him. He seems, however, to rely upon the fact that there could be no liability incurred by the use of the name as the most important ingredient in the case.

In the present case, both parties seem to me to have put their respective rights too high. The Defendant is entitled to use the Plaintiff's name in the business so long and so far as he does not by so doing expose him to any liability, but no further. In my opinion, the proper mode of dealing with the case is to restrain the Defendant, his servants and agents, from so using the name of the Plaintiff as to expose the Plaintiff to any liability. No costs will be given on either side.

Solicitors: *Ingoldby & Martin*; *Keene, Marsland, & Bryden.*

(1) 10 Ch. D. 436. (2) 43 Ch. D. 208. (3) Ch. D. 221.

W. W. K.

GUARDIANS OF TENDRING UNION *v.* DOWTON.

STIRLING, J.

1890

May 22.

[1889 T. 1348.]

Local Government—Street Improvement—Expenses of Metalling and Paving a Road—Charge upon Premises—Premises subject to Restrictive Covenant—Sale to satisfy Charge free from Covenant.

The charge for expenses of street improvements created by sect. 257 of the *Public Health Act*, upon premises in respect of which such expenses have been incurred by a local authority acting under sect. 150 of the Act, is an overriding charge upon the whole proprietorship of such premises; and premises subject to a covenant restricting the owner thereof from building thereon may, for the purpose of satisfying such charge, be ordered to be sold free from such restrictive covenant.

MOTION for judgment upon admissions in the pleadings under Order XXXII., rule 6.

The statement of claim contained allegations to the following effect:—

The Defendant *Dowton* was the owner in fee of a triangular piece of land (hereinafter called the premises), fronting or abutting upon *Anglefield Road*, in the parish of *Great Clacton*, *Essex*, subject to a covenant restricting him, his heirs and assigns from building thereon. The Defendant *Slimon* was one of the persons who were entitled to the benefit of this covenant, and by reason of the existence of the covenant the premises were of very little value.

On the 20th of March, 1886, the Plaintiffs, who as the local sanitary authority, were duly authorized in that behalf, put into operation sect. 150 of the *Public Health Act*, 1875, and served notices upon the owners and occupiers of land and premises adjoining *Anglefield Road* (which was then a street, not being a highway repairable by the inhabitants at large), requiring them to level, pave, metal, flag, and channel it; and one of such notices was served upon the then owner or occupier of the premises.

The notices not being complied with, the Plaintiffs executed the works themselves, and completed them on the 5th of

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February, 1887. At that date the Defendant *Dowton* was the owner of the premises; and on the 16th of September, 1887, the Plaintiffs, having apportioned the sums expended by them on the execution of the works amongst the various owners, served the Defendant *Dowton* with a notice stating that the proportion of such expenses payable by him as owner, and in respect of premises, was £131 1*s.* 9½*d.*

The Defendant *Dowton* did not dispute the apportionment, and the Plaintiffs having duly demanded from him the sum so apportioned, an order was made on the 18th of March, 1888, by a Court of summary jurisdiction, that the Defendant *Dowton* should pay that sum to the Plaintiffs, with interest at 5 per cent., and £2 17*s.* 8*d.* for costs.

The Plaintiffs afterwards issued a warrant of distress against *Dowton's* goods, but none could be found to satisfy the warrant; and, being unable to recover payment from *Dowton*, the Plaintiffs on the 6th of August, 1889, brought this action, claiming, first, that the £131 1*s.* 9*d.* and £2 17*s.* 8*d.*, and interest from the 14th of August, 1888, might be declared a charge upon the premises; and, secondly, that for the purpose of satisfying the charge the premises might be sold free from the restrictive covenant above-mentioned, and that out of the proceeds of the sale the £131 1*s.* 9*d.* and £2 17*s.* 8*d.*, with interest and the costs of the action, might be paid to them.

By an order made in the action the Defendant *Slimon* was appointed to represent all other persons interested in the benefit of the covenant in restraint of building, for the purpose of deciding the question whether the charge claimed by the Plaintiffs overrode such covenant.

The Defendant *Slimon* delivered a defence, admitting, for the purpose of the action only, the allegations contained in the statement of claim. The Defendant *Dowton* did not plead or appear.

The following are material sections of the *Public Health Act*, 1875:—

Sect. 4: "'Owner' means the person for the time being receiving the rackrent of the lands and premises in connexion with which the word is used, whether on his own account or

as agent or trustee for any other person, or who would so receive the same if such lands or premises were let at a rackrent."

"Sect. 150: Where any street within any urban district (not being a highway repairable by the inhabitants at large) . . . . is not sewered, levelled, paved . . . . and made good . . . . to the satisfaction of the urban authority, such authority may, by notice addressed to the respective owners or occupiers of the premises fronting, adjoining, or abutting on such parts thereof as may require to be sewered, levelled, paved . . . . require them to sewer, level, pave . . . . or make good . . . . the same within a time to be specified in such notice. . . . . If such notice is not complied with, the urban authority may, if they think fit, execute the works mentioned or referred to therein; and may recover in a summary manner the expenses incurred by them in so doing from the owners in default, according to the frontage of their respective premises."

"Sect. 257: Where any local authority have incurred expenses for the repayment whereof the owner of the premises for or in respect of which the same are incurred is made liable under this Act or by any agreement with the local authority, such expenses may be recovered, together with interest at a rate not exceeding five pounds per centum per annum, from the date of service of a demand for the same till payment thereof, from any person who is the owner of such premises when the works are completed for which such expenses have been incurred, and until recovery of such expenses and interest the same shall be a charge on the premises in respect of which they were incurred."

Alexander Macmorran, for the Plaintiffs, in support of the motion:—

The expenses incurred by the Plaintiffs in executing the works which they have done, are, under the 257th section of the *Public Health Act*, 1875, "a charge on the premises in respect of which they were incurred." That is to say, these expenses are a charge upon the land itself—a charge not upon the interest of any particular owner or owners of the premises, but a charge upon the total ownership of every owner for the time being in

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proportion to the value of his interest. This has already been decided, and the principle of the decision is that the works in respect of which the expenses have been incurred are an improvement to the entire property: *Tottenham Local Board of Health* v. *Rowell* (1); *Corporation of Birmingham* v. *Baker* (2). In the last of these cases, it was held, upon this principle, that the charge created by the Act took precedence of a mortgage upon lands which had been improved by the works. The principle extends to the present case, and the charge overrides the covenant in restraint of building, and entitles the Plaintiffs to have the premises sold free from the covenant in order to satisfy it.

Edward Beaumont, for the Defendant *Slimon*:—

I admit that the Plaintiffs are entitled to an order for the sale of the land, but I contend that it must be sold subject to the restrictive covenant, and that it cannot be sold free from rights of light or of way, or easements such as ours, which are practically on the same footing.

[STIRLING, J.:—They can sell the land. If you have ancient lights, no one can build upon that land so as to interfere with your lights. That is a totally different question, which will not be affected by the sale. But you are asking me to say that, although this property might be mortgaged for thousands of pounds and this statutory charge would come in front of all such mortgages, yet because an agreement has been entered into that the property is to remain in a particular state, the statutory charge is not to come in front of that.]

Exactly so. Because what the Plaintiffs have done is not an improvement to the angle-field. The case is not within the 257th section of the Act. The Defendant *Slimon* is one of several persons who have an easement over the angle-field, which is situate between their houses and the sea, and the object of the covenant was to preserve for those houses an uninterrupted view of the sea. Those works are no improvement to the angle-field any more than a sewer would be, for it was never intended to be built upon, but only to be kept at prairie value. If it is now

(1) 15 Ch. D. 378. (2) 17 Ch. D. 782, 785.

built upon the result of the Plaintiffs' works will be not an improvement but a detriment to the property of those who are entitled to the benefit of the restrictive covenant, for they will be cut off from their view of the sea. We have an easement of this nature over the angle-field, which easement is protected by a negative covenant; and supposing the angle-field had been taken under compulsory powers by a railway or a school board, they would not have given my clients notice to treat, or have dealt with them as having an ownership in land, but would have compensated them as persons whose interests were injuriously affected: *Clark* v. *School Board for London* (1); *Duke of Bedford* v. *Dawson* (2).

If the Plaintiffs succeed, the result will be the destruction of our negative easement. Where the Legislature intends to give a public body power to extinguish an easement, it does so in plain and clear language, as in sect. 20 of the *Artizans Dwellings Act*, 1875 (38 & 39 Vict. c. 36); but there is nothing in this Act to shew any intention that local authorities should be able to deal with property so as to sweep away negative restrictions of this kind.

This is a new question, and there is no case exactly in point. The cases cited of *Tottenham Local Board of Health* v. *Rowell* (3) and *Corporation of Birmingham* v. *Baker* (4) only decide that the statutory charge for expenses which improve a mortgaged property are a charge upon the entire ownership of it, and not merely upon the equity of redemption; and that we do not dispute. But the principle applicable to the case of a negative easement like this is a different one. If the Plaintiffs had a statutory power of sale, they could not sell free from easements of this kind.

STIRLING, J.:—

This application, no doubt, raises a new point, but it seems to me to be governed in principle by the decision in *Corporation of Birmingham* v. *Baker*. Under the powers conferred by the *Public Health Act* of 1875, the local board, who are the Plaintiffs in this case, have made a public road, which runs to a considerable

(1) Law Rep. 9 Ch. 120.
(2) Ibid. 20 Eq. 353.
(3) 15 Ch. D. 378.
(4) 17 Ch. D. 782, 785.

STIRLING, J. extent along a piece of land belonging to the Defendant *Dowton*.

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GUARDIANS OF TENDRING UNION v. DOWTON.

The Defendant *Dowton* is entitled to it in fee simple, subject to a certain restrictive covenant which prevents him from building upon it, and, as I am told, on account of this covenant, this piece of land is really worth little or nothing. The proportion of the cost of making the road which is attributable under the Act of 1875 to this piece of land is £131 1*s.* 9*d.*, a substantial sum, and the Plaintiffs, the sanitary authority, are unable to recover it from *Dowton* personally. That being so, sect. 257 applies. [His Lordship then read that section, and continued:—]

Now, the expression "owner" is defined in sect. 4 of the Act to mean any "person for the time being receiving the rack-rents of the" premises. That, I believe, has been held to include a person who may have no title at all, another being the real owner. Again, a person in receipt of the rack-rents is "owner" according to the terms of the Act, whether he is receiving the rent on his own account, or as the agent of another person; so that the cost may be recovered from the agent of a person who is actually in receipt of the rack-rent of the property. That being the very wide sense in which the word "owner" is used, the language of sect. 257 with reference to the charge is this: "Until recovery of such expenses and interest the same shall be a charge on the premises"—not on the interest of the owner in the premises—but on the premises themselves. That means on the land itself, and it accordingly has been held by the late Master of the Rolls in the case of *Corporation of Birmingham* v. *Baker* (1), that a charge under sect. 257 extends to what he terms the whole proprietorship in the land, and operates not on any particular section or portion of the proprietorship, but on the whole; and in that particular case he held the charge thus created took precedence of a mortgage on the land in respect of which the charge was sought to be enforced.

Now, it is contended, that this charge does not take precedence of these restrictive covenants. I am unable to accede to that, as it seems to me to be contrary to the principle of the decision which was given in the *Corporation of Birmingham* v. *Baker*.

(1) 17 Ch. D. 782, 785.

I think, therefore, that I must declare that the Plaintiffs are entitled to their charge upon the land, and that for the purpose of satisfying such charge the premises may be ordered to be sold free from the covenant in question.

STIRLING, J. 1890 GUARDIANS OF TENDRING UNION v. DOWTON.

Solicitors: *Oldman & Clabburn*, agents for *R. S. Daniel, Manningtree; Chamberlayne, Beaumont, & Taylor.*

W. W. K.

In re RICHARDS. HUMBER *v.* RICHARDS.

[1889 R. 51.]

STIRLING, J. 1890 *June* 3, 4, 28.

Equitable Mortgage—Real Estate—Conflicting Equities—Notice—Priority.

A solicitor having in 1883 received from a client a sum of money for investment represented to the client that he had invested it on a specified mortgage, whereas in fact the mortgage specified was one previously taken by the solicitor in his own name.

The solicitor paid interest on the amount of the specified mortgage debt to the client, down to the client's death in 1885, and to the client's executors down to his own death in 1888.

Shortly before his death the solicitor deposited the title deeds of the mortgaged property with his own bankers to secure the overdraft of his account; and he died leaving his account overdrawn to an extent exceeding the value of the mortgaged property.

Immediately after the solicitor's death the bank gave notice to the mortgagors of the deposit of the deeds with them. At the date of the deposit the bank had no notice of any claim on behalf of the client, and their notice was prior in point of date to any notice given the executors of the client:—

Held, (1.) that the solicitor was a trustee for his client of the mortgage specified, and that there was no negligence on the part of the client, or of his executors sufficient to deprive them of the prior equity; and (2.) that the principle of *Dearle* v. *Hall* (1) did not apply, and that the bank were not entitled to any priority by reason of their notice to the mortgagors being prior in point of time to that of the executors.

ADJOURNED SUMMONS.

The testator, Mr. *W. A. Richards*, was a solicitor practising at *Nottingham*, and in a creditor's action to administer his estate a

(1) 3 Russ. 1.

STIRLING, J. summons was taken out under circumstances which, as set out in an agreed statement of facts, were shortly as follows:—

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By an indenture dated the 20th of November, 1882, *J. H. Smalley & G. J. Allsopp* mortgaged eight freehold messuages in *Simpkins Street, Blue Bell Hill Road, Nottingham,* to *Richards,* to secure the repayment of £500 and interest at 5 per cent.; and on the 16th of June, 1883, they further charged the same property to *Richards* with the repayment of £50, and interest. *Richards* was the solicitor of a Mr. *William Frederick Horner,* and after his death of *Horner's* executors and trustees.

On the 9th of July, 1883, *Richards* received a sum of £300 on behalf of *Horner,* being the amount due on a mortgage to *Horner* which was then paid off; and this sum was allowed by *Horner* to remain in *Richards'* hands for the purpose of re-investment.

On the 1st of September *Richards* received from *Horner* a further sum of £250 for the same purpose. The letter in which the £250 was remitted was as follows:—

"Enclosed I send you cheque for £250 as promised, which with the amount in hand will complete the sum required (£550) for the mortgage you mentioned to me."

On the 1st of October, 1883, *Richards* wrote to *Horner*: "On the other side I send particulars of the £550 security as requested." The particulars sent in the letter were as follows: "Description—a piece of land with eight messuages thereon situate in *Simpkins Street, Blue Bell Hill Road,* in the town of *Nottingham,* purchased by the vendors for £915. Mortgagors, *J. H. Smalley & G. J. Allsopp.* Amount of mortgage money, £550. Rate of interest, 5 per cent. per annum."

On the 19th of December, 1883, *Smalley & Allsopp* repaid to *Richards* the sum of £50, and on the 22nd of December, 1883, *Richards* wrote to *Horner* as follows:—

"£550. *Allsopp & Smalley.*

"I have been from home, or yours of the 18th inst. should have had an earlier reply. The transfer to you will be dated the 1st of September last; but it is not yet completed, as the mortgagors are paying off £50 so as to reduce the mortgage to £500. Up to

the above date interest on the £300 will be paid, and thenceforward on the whole amount."

On the 10th of May, 1884, *Richards* wrote to *Horner*:—

"Yourself and *Allsopp*.

"I find that this £50 was repaid on the 19th of December last, and enclosed I send you a cheque for that amount, the receipt whereof please acknowledge."

On the 13th of May, 1884, *Richards* wrote to *Horner*:—

"£50.

"Messrs. *Smalley & Allsopp* wish to know if you are willing to again advance the £50 on mortgage of their property in *Simpkins Street*, which was paid off by them in December last."

On the 19th of May, 1884, *W. F. Horner* sent to *Richards* the sum of £50. On the 19th of May, 1884, *Richards* wrote to *Horner*:—

"I am in receipt of your cheque for £50 to be advanced on mortgage to Messrs. *Smalley & Allsopp*, making in all £550 so advanced to them."

Richards paid the £50 to *Smalley & Allsopp* on the 21st of May, 1884, and took a receipt from them; and he regularly paid interest on the £550 to *Horner* during his life, and to his executors after his death, which occurred on the 20th of August, 1885.

In November, 1888, the account of *Richards* with his bankers, the *Nottingham and Nottinghamshire Bank* was overdrawn, and as a security for the overdraft he deposited with them, on the 12th of November, 1888, the indentures of the 20th of November, 1882, and the 16th of June, 1883, together with a conveyance dated the 20th of November, 1882, of the property included in the mortgage to *Smalley & Allsopp*.

Richards died on the 21st of December, 1888. At the time of his death his account with the bank was still overdrawn, and since the 12th of November, 1888, it had never been overdrawn to a less amount than £1980.

On the 28th of December, 1888, the bank gave notice in

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writing to *Smalley & Allsopp* of the deposit of the deeds, and they on the same day acknowledged the receipt of the notice, and stated that the sum of £550 was still owing by them upon the security of the deeds. The administration action was instituted in 1889, and this summons was taken out therein by the legal personal representatives of *Horner*, in order to determine (*inter alia*) the questions whether the bank as equitable mortgagees were entitled to retain possession of the deeds so deposited with them by *Richards*, and who was entitled to the benefit of the mortgage executed by *Smalley & Allsopp* to *Richards*. The summons asked that the executors of *Richards* and all other necessary parties might be ordered to transfer to the applicants (*inter alia*) the mortgage by *Smalley & Allsopp* to *Richards*, and might be ordered to pay to the applicants any sums received in respect of interest on the mortgage since the death of *Richards*.

Hastings, Q.C., *and Levett*, in support of the summons:—

In this case the solicitor concealed from his client the fact that he himself was the mortgagee; and the question is, whether the executors of the client, or the solicitor's bankers with whom the deeds were deposited, are entitled to the benefit of the mortgage executed by *Smalley & Allsopp* to the solicitor. It is a contest between persons having equitable titles, and our title, which is prior in point of date, prevails. The solicitor received the money from his client for the purpose of investing it in a specified security; and, that security being in fact his own, he became a trustee of it for the client, and his subsequent equitable mortgagees cannot set up their title against that of the client. *Harpham* v. *Shacklock* (1). There are here no circumstances of negligence or fraud upon the part of the client or his executors to make the posterior equity the better one; *Bradley* v. *Riches* (2). We admit that the notice given by the bank to the mortgagors was prior in point of date to any notice given by us; but we say that they acquired no priority over us by such notice.

Frank Wright, for the Plaintiff in the administration action.

Theobald, for the executors of *Richards*.

(1) 19 Ch. D. 207. (2) 9 Ch. D. 189.

Swinfen Eady, for the bank:—

Upon the facts, *Richards* was not a trustee for *Horner* of the property comprised in the mortgage to *Smalley & Allsopp*: *Middleton* v. *Pollock* (1). The bankers gave notice of their charge before the executors, and, as a consequence of their diligence in so doing, they are entitled to priority. It is settled by authority that a mortgagee who gives notice to the debtor thereby obtains priority over a prior mortgagee who has not done so: *Dearle* v. *Hall; Loveridge* v. *Cooper* (2); *Ryall* v. *Rowles* (3). No doubt the mortgage there was a mortgage of a *chose in action*; while here it is a mortgage of real estate. But there is no difference in principle, and there is no authority that the doctrine does not apply to a mortgage of real estate. Moreover, the mortgage debt is a *chose in action*.

Again, *Horner* and his representatives have been guilty of negligence of such a character as to postpone their security, if it were otherwise entitled to priority to that of the bank. By leaving the title deeds in the hands of *Richards*, they enabled him to deposit them with the bank. The real nature of the transaction is shewn by the letter of the 22nd of December, 1883, and must have been known to *Horner*. It was not that *Horner* entrusted *Richards* to invest money for him on mortgage, but that *Horner* bought *Richards'* mortgage from him, and did not take the trouble of seeing that he got a proper transfer of it.

Hastings, in reply.

June 28. STIRLING, J.:—

The question I have to decide is whether the executors of *W. F. Horner* or the *Nottingham Bank* are entitled to the benefit of the mortgage executed by *J. H. Smalley* and *G. J. Allsopp* to *W. A. Richards'* the testator in this action. The materials upon which I have to decide the case are set out in an agreed statement of facts. Both *Richards* and *W. F. Horner* are dead, and the materials are somewhat imperfect. [His Lordship then stated the facts to the effect above set forth, and after observing that it

(1) 4 Ch. D. 49. (2) 3 Russ. 1.
(3) 1 Ves. Sen. 348; 1 Atk. 165.

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appeared that *Richards* had concealed from *Horner* the fact that he himself was the mortgagee, continued:—] The question is whether the executors of *Horner* or the banking company are entitled to the benefit of the mortgage. The letter of the 1st of October, 1883, appears to have created a trust in favour of *Horner*. The case of *Harpham* v. *Shacklock* (1), is an authority for that. Under the circumstances I have mentioned, it was contended on behalf of the executors of *Horner* that, the title of both claimants being equitable, they rank according to priority of date, and that as *Horner's* title was the earlier, it must prevail over that of the bank. But it was said on behalf of the bank that *Horner* and his executors had been guilty of negligence such as to postpone their security to that of the bank; and further, that the bank had gained priority by having given notice before the executors. As to the first point, it must be observed on behalf of the executors, that any person is entitled to vest property in another as trustee for himself and to leave the title deeds relating to the property in the hands of the trustee. That was decided in *Shropshire Union Railways and Canal Company* v. *Reg.* (2), and the question was further considered in *Carritt* v. *Real and Personal Advance Company* (3). The latter was a very strong case; for there a solicitor took a mortgage in the name of his clerk and left the deeds in the possession of the clerk; and it was held that he was not postponed to persons taking a title from the clerk. But it is said that the real transaction was a bargain by *Horner* for the purchase of *Richards'* mortgage, and reliance was placed upon the letter of the 22nd December, 1883, and it is contended that *Horner* must be taken to have known the real nature of the transaction, and consequently that this was not the case of *Richards* making an investment for *Horner*, but the case of *Horner* purchasing from *Richards* and not seeing that he got a proper transfer to himself. If that could be made out, the argument might be well founded. But there is nothing in the letter to shew that *Horner* knew that *Richards* was a mortgagee of the property. Further than that, *Richards* was the solicitor of *Horner*, and was acting as such in reference to this

(1) 19 Ch. D. 207. (2) Law Rep. 7 H. L. 496.
(3) 42 Ch. D. 263.

matter; and it has been laid down in *Hunt* v. *Elmes* (1), that "clients in the ordinary course of business trust their solicitors, and negligence cannot be imputed where the ordinary course of business has been observed. If, indeed, we were to charge the plaintiff on this ground, the effect would be, that in every case where a mortgage was taken by a client from his solicitor, the safety of the client would require that a separate solicitor should be employed on his behalf." And further, in *Dixon* v. *Muckleston* (2) it was held that clients are entitled to rely on representations made by their solicitors in the ordinary course of business. There is nothing in this case to shew that anything occurred to make *Horner* distrust *Richards*; and it appears to me that the letters shew that *Horner* was not trusting idly to *Richards*, but was making inquiries, and that the answers of *Richards* amount to a representation that the usual course of business was being followed. I accordingly hold that *Horner* was not guilty of negligence, and that that point on behalf of the bank fails.

The next point is as to notice, and the principle relied on is laid down in *Dearle* v. *Hall*; *Loveridge* v. *Cooper* (3); and it is said that there is no authority that a mortgage of real estate stands on a different footing from an ordinary *chose in action*. The particular point does not appear to have been decided; but in principle it is covered by decisions which have long been recognised.

The principle on which those cases rest is laid down by Lord *Lyndhurst* in *Dearle* v. *Hall* (4), where he says: "Where personal property is assigned, delivery is necessary to complete the transaction, not as between the vendor and the vendee, but as to third persons, in order that they may not be deceived by apparent possession and ownership remaining in a person, who, in fact, is not the owner. This doctrine is not confined to chattels in possession, but extends to *choses in action*, bonds, &c.: in *Ryall* v. *Rowles* (5) it is expressly applied to bonds, simple contract debts, and other *choses in action*. It is true that *Ryall* v. *Rowles* was a case in bankruptcy; but the Lord Chancellor called to his

(1) 2 D. F. & J. 578, 588.
(2) Law Rep. 8 Ch. 155.
(3) 3 Russ. 1, 30.
(4) 3 Russ. 58.
(5) 1 Ves. Sen. 348; 1 Atk. 165.

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assistance Lord Chief Justice *Lee* and Lord Chief Baron *Parker*, and Mr. Justice *Barnett*; so that the principle, on which the Court there acted, must be considered as having received most authoritative sanction. These eminent individuals, and particularly the Lord Chief Baron and Mr. Justice *Burnett*, did not, in the view which they took of the question before them, confine themselves to the case of bankruptcy, but stated grounds of judgment which are of general application." It is there laid down that the principle is the same as that which in *Ryall* v. *Rowles* (1) was applied to simple contract debts and *choses in action*. Now, in *Jones* v. *Gibbons* (2) the question arose whether *Ryall* v. *Rowles* applied to mortgage debts, and Sir *W. Grant* said (3): "It is then objected, that with regard to the mortgage debts no notice has been given to the debtor, and the assignments of the mortgages were not registered in *Jamaica*; and the trustees admit, the reason of not registering them was, that it might have prevented his carrying on his trade. A mortgage consists partly of the estate in the land, partly of the debt. So far as it conveys the estate, the assignment is absolute and complete the moment it is made according to the forms of law. Undoubtedly it is not necessary to give notice to the mortgagor, that the mortgage has been assigned, in order to make it valid and effectual. The estate being absolute at law, the debtor has no means of redeeming it but by paying the money. Therefore he, who has the estate, has in effect the debt; as the estate can never be taken from him except by payment of the debt. With regard to the mere bond or covenant, which perhaps may accompany the mortgage, it is said, that all the ceremonies, declared to be necessary as to debts in general, ought to be observed. But it is difficult to say, the mortgage passes, and is well assigned to one person, and yet the debt remains in another. It is impossible, that it can be so divided. Therefore by the assignment of the mortgage the debt necessarily passes, as incident to it; and it is clear, that, to constitute a valid assignment, notice to the mortgagor is not necessary. In *Wallwyn* v. *Assignees of Shepherd* the bankrupt had deposited a mortgage and bond; and Lord *Alvanley* decreed that

(1) 1 Ves. Sen. 348; 1 Atk. 165. (2) 9 Ves. 407.
(3) 9 Ves. 410.

the assignees should execute a valid assignment; yet the mortgagor had no notice whatsoever of the deposit. It would be strange to say, a mere deposit should be effectual against the assignees, and a valid and complete assignment should not. These mortgage debts therefore passed by the assignment of the mortgages; and the plaintiffs are not entitled to any account of them."

That was a clear decision that the title of the particular assignee prevailed as against the assignees in bankruptcy. That was followed in *Ex parte Mackay* (1) and *Ex parte Barnett* (2). Those were all bankruptcy cases; but the same principle was recognised by Lord *Hatherley* in *Re Hughes' Trusts* (3). In that case (4) Lord *Hatherley* takes notice of the difference between the case of a person having merely an interest in money to arise from a sale of land and the case of an equitable mortgagee of land. He says: "The case of an equitable mortgage is quite different. Suppose it is one mortgage, it is quite plain that it is different, because one mortgagee, if he has an equitable estate in the land of which he is the *cestui que trust*, may at any time require his trustees to convey that equitable estate to him. If it should happen that there are several mortgages, if a single mortgagee could require to have the estate conveyed to him it follows that, if all the mortgagees concur they are tenants in common of the mortgage, and, all of them concurring, could have it either conveyed to themselves, in order to secure their several mortgage debts, or conveyed to trustees for them, they joining as one individual in making that request. They have a distinct estate in equity in the land itself, which is a case entirely different from the position of persons merely having an interest in the money which is to be produced by sale or mortgage, as they had in *Lee* v. *Howlett* (5), and as they had in *Foster* v. *Cockerell*" (6). So that from the time of Sir *W. Grant* down to that of Lord *Hatherley* the rule with respect to mortgage debts has been, that as between the particular assignee and the assignee in bankruptcy the title of the particular assignee prevails, although no

(1) 1 M. D. & D. 550.
(2) 1 De G. 194.
(3) 2 H. & M. 89.
(4) 2 H. & M. 94.
(5) 2 K. & J. 531.
(6) 3 Cl. & F. 456.

STIRLING, J. notice has been given to the mortgagor by the former. That being the state of the authorities, and regard being had to the principle on which *Dearle* v. *Hall* (1) was decided, I hold in this case that the bank are not entitled to priority by reason of having given notice before the executors; and their claim, therefore, fails.

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Solicitors: *Warren, Gardner, & Murton,* agents for *Watson & Wadsworth, Nottingham; Wilson, Bristows, & Carpmael; Taylor, Hoare, & Box; Pontifex, Hewitt, & Pitt,* agents for *Wells & Hind, Nottingham.*

W. W. K.

STIRLING, J.

1889
Dec. 14, 21.

1890
Jan. 22;
June 3;
Aug. 2.

In re NEW CHILE GOLD MINING COMPANY.

Company—Call made, and not paid—Forfeiture—Reallotment—Irregularity of Forfeiture—Damages in Liquidation.

J. C., a holder of shares in a company, limited, had a call made upon him in June, 1886, which he did not pay at the time appointed by the directors; and they, by a resolution of the board, made in August, 1886, forfeited the shares, without having previously given *J. C.,* in accordance with one of the articles of association, notice that if he failed to pay on or before the day appointed for payment they might at any time forfeit them. The directors in December, 1886, allotted the forfeited shares to numerous shareholders. The shares were at the date of forfeiture at a premium. In June, 1888, the company was ordered to be wound up. In February, 1889, *J. C.* applied, under another article of association, to be allowed to prove in the liquidation for damages for the irregularity of the directors in ordering the forfeiture:—

Held, that there had been an irregularity by the directors in not giving notice to *J. C.,* and that he was entitled to prove for damages under the article, and in competition with the other creditors of the company; subsect. 7 of sect. 38 of the *Companies Act,* 1862, not applying to the case.

A SUMMONS taken out by *James Cant,* of *Orebridge, Thornton, Kirkaldy,* in the county of *Fife,* asking that he might be at liberty to prove against the assets of the *New Chile Gold Mining Company, Limited,* for the sum of £1650 for damages, for the wrongful forfeiture by the company of 6000 shares belonging to him. The liquidator had in the winding-up of the company

(1) 3 Russ. 1.

rejected the claim to prove, hence the summons to enforce it. *James Cant* died in July, 1889, and his widow, *Janet Elizabeth Cant*, had obtained a grant of letters of administration to his estate, and continued the proceedings. The matter came before the Court on Saturday, the 14th, and Saturday, the 21st of December, 1889, and on Wednesday, the 22nd of January, 1890, when leave was given to amend by adding the names of the present holders of the shares, or in the alternative asking whether the Applicant should not be restored to the register as a former holder of the shares. Nothing having been done by either party, the summons was, by order, restored to the paper, and came on to be heard on Tuesday, the 3rd of June, 1890.

The company was incorporated under the *Companies Act*, 1862, on the 20th of November, 1884, and included in the articles of association were the following : "(29.) If any member fails to pay any call on or before the day appointed for payment thereof, the board may, at any time thereafter during such time as the call remains unpaid, serve a notice on him to pay such call, together with interest, and any expenses that have accrued by reason of such non-payment, and stating that in the event of non-payment on some day and at some place (either the office of the company or a bank) named in such notice, the shares will be liable to be forfeited. (30.) If the requisitions of any notice as aforesaid are not complied with, any shares in respect of which such notice has been given may, at any time thereafter, be forfeited, by a resolution of the board to that effect, and the holder thereof shall thereupon cease to have any interest therein, and his name may be removed from the register as such holder. (31.) Any member whose shares shall be so forfeited shall, notwithstanding the forfeiture, be liable to pay to the company all calls owing upon the shares at the time of the forfeiture, and the interest (if any) thereon. (35.) For the purpose of giving effect to a sale of any shares acquired by the company by cancelment or allotment, forfeiture or surrender, which the board may prefer to sell rather than to cancel, or reissue, or a sale of any shares in respect of which such lien as aforesaid exists, the board may execute, under the company's seal, a transfer of such shares to the purchaser thereof, and such transfer shall operate to confer

STIRLING, J. 1890 *In re* NEW CHILE GOLD MINING COMPANY.

the same rights upon the transferee as if it had been executed by the member in whose name the shares shall be registered, provided that the sale of any shares in respect of a lien shall not take place without a month's previous notice to the registered holder thereof. And (36.) The remedy of any shareholder for any irregularity in any forfeiture of a share, or in the enforcing of a lien or alleged lien on any share, shall be in damages only, and the register shall be conclusive evidence of title to a share as against any person claiming as a former holder of a share which the board shall have purported to forfeit, cancel, or dispose of under the regulations of the company."

James Cant was a holder of the 6000 shares above mentioned, and calls were made upon them at various times from December, 1884, to June, 1886; the last call was made on the 18th of June, 1886, and became payable on the 31st of July, 1886. It was admitted that the call was not paid. On the 24th of August, 1886, the shares were forfeited in pursuance of a resolution of the board, and on the 28th of December, 1886, they were, with the exception of three, which could not be traced, allotted to thirteen members of the company. The shares were issued at 2*s.* each, and it was stated in Court that they were at the date of the forfeiture of the value of 7*s.* 6*d.* each, and also that the sum due by *James Cant* after the call made on the 18th of June, 1886, and which was not paid, had been deducted before making the claim for the sum of £1650 for damages. On the 25th of June, 1888, the winding-up of the company was ordered; and on the 12th of February, 1889, *James Cant* took out this summons for the purpose above mentioned. There was no evidence to shew that a proper notice had been sent to *James Cant* as required by the 29th article of association.

H. C. Deane, for the widow and administratrix of *James Cant*:—

There was no notice as required by the 29th article of association served upon *James Cant*, and consequently the forfeiture of the shares was absolutely invalid, and the applicant ought, as asked by the summons, to have leave to prove in the liquidation for the damages claimed. For any irregularity in any forfeiture

of shares the remedy is, under the 36th article, in damages only. *James Cant* has not been shewn to have been guilty of any laches, though there may have been on his part some delay. But the real question in the case is one of fact, viz., whether notice was properly sent to, and whether it was received by *James Cant*, and on the part of him and his widow, the legal personal representative, it is positively denied that notice was sent. There is not a scrap of evidence to shew that it was sent, and, if it was sent, it should be proved strictly, if it be relied upon. Therefore it is submitted that the forfeiture was as invalid an act as was ever perpetrated by any directors of a company. The shares having been wrongfully taken away from *James Cant*, and distributed amongst other persons, he could not ask to have his name put upon the register again. If he had asked for that to be done, he would have been met by the 36th article, which entitled him to damages only. The administratrix does not desire to be put on the register, but to have leave to prove for the claim in the winding-up in competition with the other creditors, as was allowed in *In re Dale and Plant, Limited* (1), to a managing director of a company for arrears of the salary due to him.

A. J. Chitty, for the liquidator:—

The case of *In re Dale and Plant, Limited*, was quite different from the present claim for damages. Difficulties have arisen because the liquidator cannot take proceedings to put *James Cant's* representative upon the list of contributories. He has, however, offered to do so as to the three shares which cannot be traced, but the offer has been refused.

[STIRLING, J.:—The other shares have got into the hands of several shareholders, and it may be that under the peculiar circumstances of the case no redress can be obtained.]

However that may be, it is submitted that there was no forfeiture of the shares, or if there was a forfeiture it must be held to have been good for all purposes, and the decision in *Wood* v. *Woad* (2) supports that view. It is submitted that this case

(1) 43 Ch. D. 255.

(2) Law Rep. 9 Ex. 190.

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does not come within sub-sect. 7 of sect. 38 of the *Companies Act*, 1862, where the words "no sum due to any member . . . in his character of a member by way of dividends, profits, or otherwise, shall be deemed to be a debt of the company, payable to such member in a case of competition between himself and any other creditor" . . . (1).

Then what rights can the administratrix have if not entitled to any under the provisions of sub-sect. 7, and where an irregularity was committed by the directors? *Houldsworth* v. *City of Glasgow Bank* (2); *Burgess's Case* (3); *Fry* v. *Moore* (4); *Selwyn* v. *Garfit* (5); *Bottomley's Case* (6).

Even supposing that the administratrix has a right to prove for damages, it must be taken into consideration only when the rights of the contributories are, as amongst themselves, being adjusted; and then only for the value of the shares as at the date when they were sold by the company, and not at the date when, as alleged, they were forfeited. She will not be entitled to recover anything in competition with the creditors, as no sum is due within the meaning of sub-sect. 7, the words of which, read with sect. 38, include past and present members.

[The cases of *In re London Celluloid Company* (7); *Knight's Case* (8); *Austin's Case* (9); *In re Addlestone Linoleum Company* (10); *Wright's Case* (11); *Forster* v. *Hoggart* (12): *Hope* v.

(1) Sect. 38 of the *Companies Act*, 1862, is that, "In the event of a company formed under this Act being wound up, every present and past member of such company shall be liable to contribute to the assets of the company to an amount sufficient for payment of the debts and liabilities of the company, and the costs, charges, and expenses of the winding-up, and for the payment of such sums as may be required for the adjustment of the rights of the contributories amongst themselves, with the qualifications following (that is to say) . . . sub-sect. 7: No sum due to any member of a company, in his character of a member, by way of dividends, profits, or otherwise, shall be deemed to be a debt of the company, payable to such member in a case of competition between himself and any other creditor not being a member of the company; but any such sum may be taken into account, for the purposes of the final adjustment of the rights of the contributories amongst themselves."

(2) 5 App. Cas. 317, 325.
(3) 15 Ch. D. 507, 510, 513.
(4) 23 Q. B. D. 395.
(5) 38 Ch. D. 273.
(6) 16 Ch. D. 681.
(7) 39 Ch. D. 190.
(8) Law Rep. 2 Ch. 321.
(9) 24 L. T. (N.S.) 932.
(10) 37 Ch. D. 191, 198.
(11) Law Rep. 5 Ch. 437.
(12) 15 Q. B. 155.

International Financial Society (1), and *Catchpole* v. *Ambergate Railway Company* (2), were also referred to.]

H. C. Deane, in reply :—

The decision in *Knight's Case* (3), is no authority in this case, nor is the decision in the case of *Wood* v. *Woad* (4). It has been attempted to make a distinction in regard to forfeitures; but if a forfeiture be irregular in any particular, then it is wholly invalid; and if any condition be prescribed in the articles, whether it be small or large, and it be not followed, the forfeiture is null and void. The forfeiture was either good or bad. There was an irregularity perpetrated in making it, and the administratrix is entitled to enforce her remedy for damages. If allowed to prove, it should be as for the value of the shares at the date of the forfeiture, when the company took them from *James Cant*, and when, as the evidence shews, they were worth 7*s.* 6*d.* each; and it also shews that they were shortly afterwards allotted to many other members of the company.

[STIRLING, J.:—I understand that *James Cant's* administratrix does not desire the liquidator to put her on the list of contributories. It seems to me that the logical result of this application is that she ought to be put on it. I will give her an opportunity to consider the matter, and to say by this day week whether she does desire to be put on it or not, and I will reserve my judgment until after that day.]

1890. Aug. 2. STIRLING, J.:—

This is an application originally on the part of *James Cant*—but he having died since the summons was taken out, now on the part of his administratrix—to be allowed to prove in the liquidation of the company in respect of a claim which arises out of his shares, having been, as is alleged, irregularly forfeited.

[His Lordship, after reading the articles and stating the facts set forth above, continued:—]

In the evidence before me, there was nothing to shew that proper notice was sent to the applicant, pursuant to the require-

(1) 4 Ch. D. 327.
(2) 1 E. & B. 111.
(3) Law Rep. 2 Ch. 321.
(4) Ibid. 9 Ex. 190.

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ments of the 29th article of association, and on that account it was contended that the forfeiture was altogether invalid—not only irregular, but wholly invalid; and that the provisions of the 36th article were not applicable. If that argument were well founded, the logical consequence would seem to be that the present holders of the shares ought to be removed from the list of contributories, and the applicant's name ought to be restored to the register. I offered to give to both the applicant and the liquidator an opportunity of taking steps for that purpose; but neither of them has thought fit to avail himself of that offer, and consequently I must treat the shares as having been forfeited in accordance with the articles of association, and I must hold that an irregularity has taken place, in respect of which the applicant is entitled to prove for damages under the 36th article.

But the company is insolvent, and it was contended that the applicant is precluded by the provisions of sect. 38, sub-sect. 7, of the *Companies Act*, 1862, from proving in respect of the claim in competition with the other creditors of the company. The section provides: [His Lordship read it, and continued:—]

I need not allude to the first six sub-sections, except to point out that some of them relate to the contributions of past members. But the 7th is as follows: "No sum due to any member of a company, in his character of a member, by way of dividends, profits, or otherwise, shall be deemed to be a debt of the company, payable to such member in a case of competition between himself and any other creditor not being a member of the company; but any such sum may be taken into account, for the purposes of the final adjustment of the rights of the contributories amongst themselves." In order, therefore, that that sub-section may be applicable, the sum sought to be proved must be due to a member of the company; and not only that, but must be due to him "in his character of a member by way of dividends, profits, or otherwise." First of all, then, I have to consider whether the applicant is a member of the company within the meaning of the 7th sub-section; and I confess that, having repeatedly considered the question whether a past member is to be treated as a member for the purposes of that sub-section, it appears to me to be one of very considerable difficulty. I do

not, however, think it is necessary on the present occasion to express a concluded opinion as to the meaning of that sub-section; but, having regard to the last words of it, "but any such sum may be taken into account for the purposes of the final adjustment of the rights of the contributories amongst themselves," it would seem to mean that the sum which is sought to be proved must be such as in its nature is susceptible of being taken into account for the purpose of the final adjustment of the rights of the contributories amongst themselves; and it is difficult to see how that can be done where the person who claims is not a past member liable to be made a contributory of the company; and in the present case the applicant ceased to be a member more than a year before the date of the winding-up, and consequently would not under the 1st sub-section be liable as a contributory. I do not, however, decide the case on that ground, because I have come to the conclusion that, supposing the applicant to be a past member within the meaning of that sub-section, the sum in question was not due to him in his character of a member; but, as it appears to me, it was, on the contrary, due to him in the character of non-member. What he claims is not any sum which is payable to a member, but damages payable to him by reason of his having been deprived of the rights of a member by an irregular act on the part of the company in respect of which the contract, contained in the articles of association, entitles him to damages. I am, therefore, of opinion that this claim is admissible, and must be admitted by the liquidator. The costs of the applicant must be added to the claim, and the liquidator will take his costs out of the estate.

Solicitors: *Morley, Shirreff & Co.; Linklaters.*

T. F. M.

KEKEWICH, J.

1890

April 1.

In re METROPOLITAN COAL CONSUMERS' ASSOCIATION.

GRIEB'S CASE.

Practice—Company—Shareholder — Contract — Misrepresentation — Action — Rescission—Separate Actions—Both parties represented by one Solicitor—Costs—Taxation—Documents—Correspondence—Duplicate Copies—Counsel's Fees—Disallowance—Discretion — Rules of Supreme Court, 1883, *Order* LXV., *r.* 27, *sub-r.* 8.

Where the successful Plaintiffs in two separate and independent actions against the same Defendant, for the same object, and supported mainly by the same evidence, and in which there has been no order or agreement that the result of one shall govern the other, have been represented by the same solicitor and the same counsel, the Plaintiff in each case is entitled, on the taxation of his costs of his action, to have his own action treated as entirely distinct from and independent of the other, and to have the same allowances as if the two actions had been conducted by separate solicitors and counsel, except as regards attendances or other matters which were or ought to have been done at one and the same time in both cases.

Thus, where charges for copies of documents and correspondence have been allowed on taxation in the one action, the Taxing Master ought not under Rules of Supreme Court, 1883, Order LXV., r. 27, sub-r. 8, to disallow charges for copies in the other action merely because the copies in the one action might have been used in the other; nor ought he to reduce the charges for counsel's fees in the latter action.

Oppenshaw v. *Whitehead* (1) followed.

ADJOURNED SUMMONS.

On the 16th of March, 1889, one *Thursby*, a shareholder in the *Metropolitan Coal Consumers' Association, Limited*, served the company with a notice of motion to rectify the register of shareholders by removing his name therefrom, on the ground of misrepresentation in the prospectus.

On the 22nd of March, 1889, upon the motion being brought on, Mr. Justice *Kay* ordered it to go into the general list of witness actions.

On the 16th of January, 1890, the case came on for hearing, and the Applicant, and also witnesses on behalf of the company,

(1) 9 Ex. 384.

having been examined and cross-examined, Mr. Justice *Kay* gave judgment for the Applicant with costs.

One *Grieb*, another shareholder, on the 25th of March, 1889, served the company with a precisely similar notice of motion. On the 29th of March, upon the motion being opened, Mr. Justice *Kay* ordered it to go into the general list of witness actions, to be brought on with *Thursby's* case. On the 16th of January, 1890, after *Thursby's* case had been disposed of, *Grieb's* case was called on, and after the Applicant had been examined and cross-examined, and the case argued on behalf of the company, Mr. Justice *Kay* gave judgment for the Applicant with costs.

The same solicitor had acted throughout for both *Thursby* and *Grieb*, but it appeared that they were perfectly independent Applicants, and that no agreement or order had been made that the result of one application should in any way govern the other. The same counsel also appeared for the Applicants in both cases.

The solicitor then carried in separate bills of costs in each case for taxation. The bill in *Thursby's* case was taxed first, the Taxing Master making the usual allowances in such a case; but on proceeding to tax the bill in *Grieb's* case he disallowed a large number of items, including prints of the company's memoranda and articles, and copies of extracts from the minute-book and of other documents for use at the hearing, and also copies of correspondence for the use of the Judge and the Applicant's counsel, on the ground that one set of prints and copies had already been charged for and allowed in *Thursby's* case, and might have been used in *Grieb's* case without the necessity of providing a second set; and he also reduced the charges for fees paid to the Applicant's leading and junior counsel.

Grieb then carried in objections to the taxation on the following grounds:—

(1.) That the Master had proceeded upon a wrong principle, the matter not being within the Rules of Supreme Court, 1883, Order LXV., r. 27, sub-r. 8;

(2.) That the application was separate and distinct from *Thursby's*, and no agreement or order had been made that the proceedings in or the result of *Thursby's* application should in any way govern or control the present;

KEKEWICH, J. 1890 GRIEB'S CASE.

(3.) That the grounds of the company's opposition were altogether different and distinct in the present application from those in *Thursby's*;

(4.) That the whole of the documents used in *Thursby's* application belonged to *Thursby*, and could not in any way be properly utilised by the present Applicant;

(5.) That the present Applicant gave instructions to his solicitor without reference in any way to *Thursby* or to his application. It was a mere accident that the two Applicants in the two separate matters were represented by the same solicitor, and that the two applications were heard on the same day. If the Applicants had been represented by a different solicitor, the items could not have been properly disallowed;

(6.) That all the items disallowed were costs necessarily and properly incurred by the present Applicant in his application against the company;

(7.) That there was no joint interest between the present Applicant and *Thursby*, and the costs of the items disallowed could not, in his own interests, have been in any way reasonably avoided; and

(8.) That, as the whole of the items had been disallowed on the same grounds, namely, that there had been a similar application by *Thursby* in which similar documents had been used and similar costs incurred, the whole of the objections applied to each item disallowed.

The Taxing Master having refused to allow the objections, *Grieb* took out this summons to have them allowed, and for a reference back to the Taxing Master to vary his certificate accordingly.

The summons was heard by Mr. Justice *Kekewich* for Mr. Justice *Kay*.

George White, for the Applicant:—

I submit that the costs in the present case should be taxed as if *Grieb* had been represented by a separate solicitor: *Oppenshaw* v. *Whitehead* (1). There has been no consolidation of the two cases, and no agreement that the one should be governed by the other.

(1) 9 Ex. 384.

Sharp v. *Wright* (1), which may possibly be cited against me, is a different case. There it was held that a solicitor who appears for the receiver in an action and also for one of the parties will be allowed on taxation only one copy of the receiver's accounts.

[KEKEWICH, J. :—That is a totally different case, and has no application to the present.]

As to counsel's fees, where they have been *bonâ fide* paid by the solicitor and are fairly required by the case, they ought not to be reduced on taxation: *Robb* v. *Connor* (2).

Quin, for the company :—

Grieb's case and *Thursby's* case being substantially identical, and coming on for hearing on the same day, a considerable part of the items charged for in *Grieb's* case, which came on immediately after *Thursby's* case, were wholly unnecessary. For instance, it could not have been necessary, after the one case was over, to hand up to the Judge another copy of the correspondence. I submit that, notwithstanding *Oppenshaw* v. *Whitehead* (3), the matter is within the discretion of the Taxing Master under the Rules of Supreme Court, 1883, Order LXV., rule 27, sub-rule 8. Under Appendix N. to the Rules, close copies are not to be allowed as of course, but the allowance is to depend on the propriety of making or sending the copies, which in each case is to be shewn and considered by the Taxing Master: Annual Practice, 1889–90 (4). In *Grieb's* case the solicitor was not entitled to charge for copies of correspondence, &c., presenting no feature of necessity. I submit, therefore, that the Taxing Master was right in disallowing, at all events, second copies of the same documents and correspondence.

KEKEWICH, J. :—

I must refer the matter back to the Taxing Master with this direction, that, except as regards attendances or other matters which were or ought to have been done at one and the same time in both cases—*Thursby's* case and this case—the solicitor is entitled to charge in this case as if he had not been engaged in *Thursby's*

(1) Law Rep. 1 Eq. 634.
(2) I. R. 9 Eq. 373.
(3) 9 Ex. 384.
(4) Page 1154.

KEKEWICH, J. 1890 GRIEB'S CASE.

case. To my mind, there has been, through, no doubt, a laudable desire to prevent abuse, a miscarriage of justice in this case. I regard the case from the client's point of view. The client, Mr. *Grieb*, sued the company for rescission of a contract to take shares, he having been, he said, induced to take the shares by fraudulent misrepresentations, and he prevailed upon the Court so to decide. In retaining a solicitor to conduct his legal proceedings, he was, in my opinion, entitled to say, "I will have my case taken into Court in the best possible manner: my brief shall be complete: the proofs of all the witnesses shall be complete: counsel shall be properly instructed, and you must go in to win." If the solicitor had thereupon said to him, "I am also acting for another client, *Thursby*, in a similar case against the same company, and it will save a great deal of trouble and expense if I only make single copies of the documents and only examine the witnesses and look through the proofs once, and otherwise really treat the two cases as one, and that I propose to do;" Mr. *Grieb*, as a sensible man, would have replied, "I have nothing to do with *Thursby*: you have to win my case: let *Thursby* win his by you or anybody else when his case comes on: but I am entitled to the full benefit of your experience, industry, and intelligence; and you must bring it all to bear on my case." If that is the proper view on the part of the client, of course the proper view on the part of the solicitor is that he is entitled to be paid independently—that when he brings in his bill he is entitled to charge for that experience, industry, and intelligence. And if he conducts a similar case for another client, he may get his costs out of that client also, who is entitled to take precisely the same line.

Then it is suggested that these two cases were so much alike that one necessarily governed the other, and that therefore there was no occasion for the double expenditure. As regards that, in the first place, each case was one of fraud, and every case of fraud must stand by itself. You never know how you may be tripped up in a case of fraud; and it does not at all follow that what would be conclusive in the one case would be conclusive in the other. And, secondly, if these two cases were in any way to be regarded as governing one another, it was for

the Defendants to come forward and say, "Try one: and if you succeed in one, we will immediately submit, without argument, to judgment in the other." Of course, if that had been done, the position of the solicitor would have been entirely different. I think the solicitor is entitled to be remunerated for his conduct of Mr. *Grieb's* case as if Mr. *Grieb* had been his only client, subject to this, by way of example—that if he had served a subpœna on a witness in the two cases, of course he could not have charged for two journeys into the country, or wherever it might be necessary to go, nor could he charge for writing two letters to the same person to serve the subpœna in the two cases. Those very matters were mentioned in *Oppenshaw* v. *Whitehead* (1), which is a useful case, and to which I hope the Taxing Master will himself refer, because the judgment there seems to lay down the principle which ought to be adopted in such cases, and which I propose to follow in this case.

Then, outside the general charges in this case, there is the question of counsel's fees. Though I have done so before, and may have to do so again, I am extremely reluctant to refer a question of counsel's fees back to the Taxing Master. It is for him to look into the matter and use his discretion: he is competent to do so, while I am not. Therefore, if that had been the only question in this case, I certainly should have had nothing to say about counsel's fees, the Master having said that the fees he had allowed were sufficient in the circumstances. But I cannot prevail on myself not to see that the circumstances on which he has relied are, the two cases being so similar, and being brought on about the same time, and the same counsel being employed. I do not think those circumstances ought to be allowed to affect the case. In my opinion the counsel in *Grieb's* case ought to have proper briefs: I think also that the counsel in *Thursby's* case ought to have proper briefs; and if the counsel have the briefs, of course the solicitor is entitled to charge for them. Therefore I shall refer the whole matter back generally to the Taxing Master with the direction I have mentioned, and I think the Applicant must have his costs in any event.

Solicitors: *W. A. Colyer; Lumley & Lumley.*

(1) 9 Ex. 384.

KEKEWICH, J.

1890

May 3, 9, 10, 23.

BATTEN, PROFFITT & SCOTT *v.* DARTMOUTH HARBOUR COMMISSIONERS.

[1886 B. 402.]

Mortgage—Harbour Commissioners—Costs—Action to enforce Charge and ascertain Priorities of Incumbrancers—Costs of Commissioners—Commissioners Clauses Act, 1847 (10 & 11 *Vict. c.* 16), *s.* 60 [*Revised Ed. Statutes, vol. x., p.* 45]—*Costs of Plaintiff.*

A firm of solicitors who had recovered judgment against harbour Commissioners for the amount of a bill of costs, brought an action against the Commissioners in the Chancery Division for a declaration that the Plaintiffs were entitled to a charge on the property of the Commissioners, enforcement of the charge, an inquiry to ascertain and determine the other persons entitled to charges, and the rights of the Plaintiffs and such persons, and for the appointment of a receiver of the Commissioners' undertaking. A receiver was appointed, and judgment given, directing an inquiry as to incumbrancers and their priorities. The Chief Clerk, in answer to the inquiry, certified the priorities, and found that the Plaintiffs were entitled to a charge subject to certain specified incumbrances and in priority to others. There was a fund in court consisting of moneys which had come to the hands of the receiver.

Upon further consideration of the action:—

Held, that sect. 60 of the *Commissioners Clauses Act*, 1847, was applicable to the Commissioners, not only personally, but as a corporate body, and that, by virtue of the right of indemnity conferred by that section, the Commissioners, notwithstanding that they were in the position of mortgagors, were entitled to their costs of the action as between solicitor and client out of the fund in Court in priority to all other parties:—

Held, also, that according to the principles established in *Ford* v. *Earl of Chesterfield* (1) and *Wright* v. *Kirby* (2) the Plaintiffs were entitled, in priority to the other parties except the Commissioners, to be paid out of the fund their costs of the action, so far as the other parties except the Commissioners had had the benefit thereof in securing the fund in Court and ascertaining and determining the rights of the parties to it.

By the *Dartmouth* Harbour Order, 1863, which was confirmed by the *Pier and Harbour Orders Confirmation Act*, 1863, the Defendants were incorporated and empowered to construct works and demand and receive rates, and to borrow money on the security of their works, lands, property and rates; and by the *Dartmouth* Harbour Order, 1870, and the *Pier and Harbour*

(1) 21 Beav. 426. (2) 23 Beav. 463.

Orders Confirmation Act, 1870 (No. 1), further powers to the like effect were conferred on the Defendants. By the *Dartmouth Harbour Improvement Act*, 1882 (45 & 46 Vict. c. cc.), further powers of constructing works, demanding and receiving rates, and borrowing money were conferred on the Defendants, and by sect. 45 of that Act it was provided as follows: "The Commissioners shall apply all rates, dues, and other income now belonging to them, and all moneys received as revenue in respect of their undertaking, for the purposes and in the order following and not otherwise; (1.) In paying the costs of and connected with or incidental to the preparation and passing of this Act; (2.) In paying the salaries of the clerk, auditor, harbour master and harbour police officers and servants, the expenses of watching, lighting and maintaining the harbour, and of providing and maintaining in proper condition all the works, buoys, moorings, appliances, and other conveniences belonging to the harbour, and paying all other current expenses of the Commissioners; (3.) In paying year by year the interest on money borrowed by them; (4) In from time to time providing . . . a sinking fund for the repayment of money borrowed . . .; (5.) In paying the cost of the works authorized by this Act, and of lands or property acquired for the purposes of this Act, and the other expenses incurred in the improvement of the harbour or otherwise under this Act."

The Plaintiffs were a firm of solicitors who had brought an action against the present Defendants for the amount of a bill of costs, and had recovered judgment for the sum of £582 15*s.* 6*d.* The judgment remained unsatisfied, and the Plaintiffs brought this action, alleging, by their statement of claim, as follows: "The Commissioners allege that they owe certain sums of money to divers persons on bonds and otherwise, and that the same or some of them are charged upon the undertaking and payable in priority to the claim of the Plaintiffs; but the Plaintiffs say that the same have not nor has any of them priority to the Plaintiffs' judgment-debt, which should be paid thereout in the first place. The Defendants sufficiently represent the other creditors of the Commissioners." The Plaintiffs claimed—(1.) That it might be declared that under and by virtue of their judgment they were entitled

KEKEWICH, J.

1890

BATTEN, PROFFITT & SCOTT v. DARTMOUTH HARBOUR COMMISSIONERS.

to a charge upon all the property whereof the Defendants were seised, possessed or entitled for any estate or interest at law or in equity. (2.) That such charge might be enforced by sale, foreclosure, delivery in execution, or otherwise, as the Court might direct. (3.) That an inquiry might be made as to what persons had liens or charges upon the property or undertaking of the Defendants, and that the rights of the Plaintiffs and such persons might be ascertained and determined; and (4.) That a receiver and manager might be appointed of the property, tolls, dues, and duties, and the undertaking of the Defendants.

On the 29th of January, 1886, an order was made in this action, on the application of the Plaintiffs, for the appointment of a receiver of the undertaking of the Defendants. Moneys arising from the undertaking were from time to time received by the receiver and paid into Court.

On the 13th of March, 1886, judgment was given directing—(1.) An account of what was due to the Plaintiffs under their judgment. (2.) An inquiry of what the property and assets of the Defendants consisted; and (3.) An inquiry whether there were any other and what debts of the Defendants, and whether the same or any and which of them were incumbrances or charges on the undertaking or assets of the Defendants, or the tolls and moneys arising out of their undertaking, or any and what part of the same respectively, and how the same were respectively created, and what were the rights and priorities of the persons for the time being entitled thereto.

The Chief Clerk, by his certificate, dated the 3rd of August 1889, found that £664 3*s.* 9*d.* was due to the Plaintiffs, and that they were entitled to a charge for the same on the tolls, rates, undertaking, and property of the Defendants, subject to specified charges and incumbrances and a specified lien, and in priority to certain other charges. The prior charges and incumbrances were in favour of (1.) the Public Works Loans Commissioners, (2.) certain private individuals named, (3.) the *Rock Life Assurance Company*, (4.) the trustees of the *Rational Sick and Burial Association*, and others. The charges No. 1 were effected under the Order of 1863 only, No. 2 under the Orders of 1863 and 1870, and the other charges under those orders and the Act of 1882.

The lien was in favour of the Corporation of *Dartmouth*, in respect of unpaid purchase-money.

It further appeared from the certificate that there were standing in court to the credit of the action sums of £2856 10*s.* 11*d.* New Consols, £24 10*s.* 2*d.* money on deposit, and 1*s.* cash.

The action now came on to be heard by Mr. Justice *Kekewich* (sitting for Mr. Justice *Kay*), on further consideration and summonses to vary the Chief Clerk's certificate taken out by incumbrancers other than the Plaintiffs (1).

Millar, Q.C., and *Mulligan*, for the Plaintiffs:—

The appointment of the receiver prevented the Commissioners from preferring creditors, and the effect has been to protect the property for the benefit of the incumbrancers, and to prevent the rates and tolls being swept away. The fund in court has been realized and saved by the action of the Plaintiffs, and, according to well-established principles, they are entitled to their costs in priority to all other parties: *Ford* v. *Earl of Chesterfield* (2); *Wright* v. *Kirby* (3); *White* v. *Bishop of Peterborough* (4).

Marten, Q.C., and *Swinfen Eady*, for the Defendants, the *Dartmouth Harbour Commissioners*:—

Under the provisions of the special Acts and of the *Commissioners Clauses Act*, 1847, the Commissioners are entitled in

(1) By the *Commissioners Clauses Act*, 1847, s. 60, "no Commissioner, by being party to or executing in his capacity of Commissioner any contract or other instrument on behalf of the Commissioners, or otherwise lawfully executing any of the powers given to the Commissioners, shall be subject to be sued or prosecuted, either individually or collectively, by any person whomsoever; and the bodies or goods or lands of the several Commissioners shall not be liable to execution of any legal process by reason of any contract or other instrument so entered into, signed, or executed by them, or by reason of any other lawful act done by them in the execution of any of their powers as Commissioners; and the Commissioners respectively, their heirs, executors, and administrators, shall be indemnified out of the rates and other moneys coming to the hands of the Commissioners by virtue of this and the special Act for all payments made or liability incurred in respect of any acts done by them, and for all losses, costs, and damages which they may incur in the execution of the powers granted to them."

(2) 21 Beav. 426.

(3) 23 Beav. 463.

(4) Jac. 402.

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the first instance to be paid their costs of action as between solicitor and client, and other costs, charges, and expenses out of this fund. They are in the position of trustees, and entitled to be indemnified as such. It is suggested that because the Commissioners have executed mortgages, the costs of the mortgagees must come first. Such a doctrine would deprive the Commissioners of the power of executing their office under sect. 45 of the *Improvement Act* of 1882.

Renshaw, Q.C., and *Grosvenor Woods*, for the *Rock Life Assurance Company*:—

The rule in *Ford* v. *Earl of Chesterfield* (1) is, no doubt, clear where the action is brought for the purpose of settling priorities. There the general costs, other than the costs of administration incidentally arising, are given to the plaintiff, because he brought the action for the benefit of all parties. But this action is not of that character. Here the primary object was to obtain a declaration of a charge, and to have the charge enforced by the appointment of a receiver and manager. In such a case the only costs proper to the plaintiff in the first instance are such as do not relate to the mere ascertainment of priorities. To the costs of the preservation of the fund he may be entitled, for the other incumbrancers get the benefit of that.

Then, as to the costs of the Commissioners, it is submitted that sect. 60 of the *Commissioners Clauses Act*, 1847, has no application. That section (in common with those which immediately follow it) applies only to the Commissioners as individuals, and indemnifies them where they are made parties not as Commissioners but personally.

[KEKEWICH, J.:—What are the Commissioners to say to their solicitor?]

He has a right against them as a corporate body, but not against the corporators separately. The Commissioners cannot be entitled to costs by way of indemnity as against their own mortgagees: *Blaker* v. *Herts and Essex Waterworks Company* (2); *Johnstone* v. *Cox* (3); *In re Dominion of Canada Plumbago Com-*

(1) 21 Beav. 426.
(2) 41 Ch. D. 399.
(3) 19 Ch. D. 17.

pany (1). The money lent by the incumbrancers has been received by the Commissioners, and any right of indemnity they have as trustees against their *cestuis que trust* will attach to the mortgage money. They cannot be entitled to indemnity also as against the mortgaged property in the hands of the mortgagees.

Marten:—Sect. 60 of the *Commissioners Clauses Act*, 1847, applies to the Commissioners as a body. That is clear from the definition in sect. 2. Sect. 60 gives them a right to complete indemnity out of the rates for all liability and costs incurred. The *Improvement Act* of 1882 is express that all "current expenses" are to be paid in priority to interest on money borrowed.

Horton Smith, Q.C., and *Stewart Smith*, for other incumbrancers:—

The case is not within sect. 60 of the Act of 1847. That section applies only to rates and moneys "coming to the hands of the Commissioners." The fund in Court never came to their hands, but consists of rates and tolls got in by the receiver appointed in the action.

Ingle Joyce, for the Public Works Loans Commissioners, in support of the same contention, referred to *In re Birt* (2).

Fitzgerald, *Upjohn*, and *Bakewell*, for other parties.

Millar, in reply:—

The merit of the Plaintiffs' claim consists in their having asked that the priorities should be ascertained. In *Wright* v. *Kirby* (3) a distinction is clearly drawn between the general rule whereby mortgagees add their costs to their securities, and the case of a mortgagee not filing a bill selfishly to redeem, but one in which the priorities and amounts may be ascertained. No distinction is made as to any particular portion of the costs; but the entire costs are given to the plaintiff on the ground that the action is for the general benefit to which the other parties have come in. The rule by way of exception is as absolute as the general rule.

(1) 27 Ch. D. 33. (2) 22 Ch. D. 604. (3) 23 Beav. 463.

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KEKEWICH, J.:—

In this case two questions as to costs, which have to be decided on the same application, present considerable difficulty. The case has been before the Court for some time, and I have listened to several counsel who have delivered long, but not too long, arguments. I will deal with Mr. *Millar's* point first, because it is freshest in my mind, having been last argued. He desires to put his claim on *Ford* v. *Earl of Chesterfield* (1); but I think I may leave *Ford* v. *Earl of Chesterfield* out of consideration for the moment, because in *Wright* v. *Kirby* (2) the same Judge, Lord *Romilly*, stated the principles by which the Court ought to be guided, and the rules to be adopted in cases of this kind, and expressly said that it was in accordance with these rules that he decided *Ford* v. *Earl of Chesterfield*. The rules are stated at p. 467 of the report in 23 Beavan. I do not propose to read them, except to point out that the Master of the Rolls places an action by an incumbrancer, in which the plaintiff is allowed his costs, on the footing of an administration action, and gives him his costs as in an action of that character. That seems to me at once to let in the discretion of the Court to see what is, and what is not, properly to be deemed administration, and what costs have been properly incurred for the purposes of administration. The present case is to some extent new to me, and I am dealing with it at some disadvantage; but, from what I have seen and heard, I do not think it is altogether clear that the Plaintiffs have throughout acted for the benefit of the other incumbrancers, whose title, to some extent certainly, they were disputing. On the other hand, there can be no doubt that, whether they intended it or not, they have done much good to them. They have obtained the appointment of a receiver, and have caused a fund to be brought into Court, and an inquiry has been directed and answered, so that the parties entitled to that fund have been ascertained. So far, certainly, the Plaintiffs have laboured for the advantage of others. Mr. *Millar* has said that they are therefore entitled to all their costs of the action. That, to my mind, does not follow. It is possible that they may be so entitled. I do not say they are not; but it is probable that

(1) 21 Beav. 426. (2) 23 Beav. 463.

some of the costs have been incurred on their own behalf only, and with a view solely to their own interest. I think I ought to give them those costs which come within *Wright* v. *Kirby* (1); but I think I ought not to give them those costs, if any such there be, which, in the result, may be ascertained not to be within the doctrine of that case. I shall direct the Taxing Master in taxing the costs of the Plaintiffs to distinguish the costs of which the other parties, except the Commissioners, have had the benefit in securing the fund in Court and ascertaining or determining the rights of the parties to it. Those costs I think the Plaintiffs are entitled to in priority; and, as Mr. *Millar* pointed out, they must be distributed over the three funds. As regards the rest of the costs, the Plaintiffs must add them to their security in the usual way as mortgagees. That disposes of the Plaintiffs.

Then, as to the costs of the Commissioners, there is also a question of some little difficulty. Priority for them is claimed under the general Act, the *Commissioners Clauses Act*, 1847, and also under the special Acts. I shall call them special Acts, because, although they are in fact Provisional Orders, they are confirmed by, and have the force of, and indeed really are, Acts of Parliament, being scheduled to Acts. As regards the special Acts, I do not myself see any ground for acceding to Mr. *Marten's* argument. I think that the costs and expenses there mentioned do not mean costs or expenses of litigation, but only ordinary expenses, *i.e.*, those necessarily or probably occasioned by managing their undertaking, and doing the work which the Act of Parliament throws upon them. I will not go through all the different clauses of the Acts of 1863 and 1870, because I turn to sect. 45 of the Act of 1882, which I think is strongest in favour of the Commissioners' view. Under sub-sect. 2 of that section the moneys received by the Commissioners as revenue in respect of their undertaking are to be applied in paying salaries, and the expenses of watching, lighting, and maintaining the harbour, and of providing and maintaining in proper condition all the works, buoys, moorings, appliances, and other conveniences belonging to the harbour, and paying "all other current expenses of the

(1) 23 Beav. 463.

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Commissioners"—and that is a stronger phrase than I find in any of the other Acts. I do not think it can extend to the costs of litigation such as this, but that it points to ordinary expenses incurred by the Commissioners in discharging their ordinary duties, and I do not think anything has been said which supports the contrary view. Therefore, as regards those Acts, I decide against the Commissioners; but after some consideration I have come to a different conclusion as regards the general Act. Mr. *Renshaw* argued that sects. 60 to 64 of the *Commissioners Clauses Act*, 1847, are only applicable to the Commissioners personally, and not to a body incorporated such as are the Commissioners in the present case. I cannot think the Legislature could have intended that, especially when we find that the expression "the Commissioners" is by sect. 2 defined to mean "the Commissioners, trustees, undertakers, or other persons or body corporate constituted by the special Act, or thereby intrusted with powers for executing the undertaking"; and I do not think the words are necessarily limited to persons. The set of sections to which sects. 60 to 64 belong are introduced by these words, "and with respect to the liabilities of the Commissioners, and to legal proceedings by or against the Commissioners, be it enacted as follows"; and I see nothing there to limit it to Commissioners not incorporated. That is my view. It is rather that there is nothing to limit it than that there is anything to extend it. By sect. 60, Commissioners are exempted from personal liability, and that provision is, no doubt, more applicable to persons than to a corporation; but after thus exempting them from liability, the section contains the following indemnity clause: "And the Commissioners respectively, their heirs, executors, and administrators, shall be indemnified out of the rates and other moneys coming to the hands of the Commissioners by virtue of this and the special Act for all payments made or liability incurred in respect of any acts done by them, and for all losses, costs, and damages which they may incur in the execution of the powers granted to them." They are to be indemnified against liabilities, and although it may be impossible to issue execution against them individually, and so get payment of the costs, still the Commissioners, as a corporation, are liable for any costs they may be

ordered to pay, so as at any rate to establish a debt. The Commissioners might, I suppose, have the ordinary order for taxation made against them on the retainer given by them, and in that way there is a liability to pay costs. Against that it seems to me they are indemnified. Why should I construe this section differently from the construction of the ordinary indemnity clause in a settlement? It is in every settlement now by Act of Parliament. According to the old form the trustees are indemnified against all liabilities incurred by them in the execution of the trusts; and, supposing, in the administration of their trusts, it becomes necessary to inquire what mortgages have been made, and what incumbrancers there are, the parties claiming through the *cestuis que trust* can only take subject to that indemnity. It seems to me I ought to apply the same sort of principle, and that the Commissioners, being trustees against whom nothing has been said as regards the propriety of their conduct, must be entitled to be paid out of their trust fund before anybody else who is interested in it, notwithstanding that they are in the position of mortgagors. The analogy of a settlement is not perfect, because, as has been said, the Commissioners are at the same time trustees and mortgagors. But I think that I am bound to regard them substantially as trustees instead of mortgagors, and to give them this indemnity. But then it is suggested that their right under the section is with respect to money coming to their hands, and that the fund which is now being dealt with is money which has been brought into Court, and that as against that they have no right to priority. I referred during the argument to a case the name of which I could not recollect, but by referring to *In re Birt* (1), mentioned to me by Mr. *Ingle Joyce*, I find that the case I was thinking of was *Richmond* v. *White* (2), which has been recently followed in *In re Jones* (3). What was decided in the last-mentioned case was that the executor's right of retainer was taken away by the appointment of a receiver, and that as the moneys taken by the receiver were not moneys in the hands of the executor, he could not insist on his right of retainer. *Richmond* v. *White* is an example of a different kind, because there

(1) 22 Ch. D. 604.
(2) 12 Ch. D. 361.
(3) 31 Ch. D. 440.

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the money was paid into Court by an insurance company, and that was said not to have taken away the right of retainer. I do not think that that applies to this case, because an executor's right of retainer is a peculiar, though well recognised, right. Here I have a statutory right to have these costs paid, and I do not think the substance of the clause is that costs are to be paid or liabilities discharged by means of moneys in the hands of the Commissioners so much as by moneys which may come to them by virtue of the Act for rents and tolls, and the use of the words, "moneys coming to the hands of the Commissioners," is really for the purpose of pointing out that to which they would resort. I think it would be a narrow construction to say that it only meant the amount actually received. I think what it means is money receivable for tolls or rents by virtue of the provisions of the Act. I, therefore, think that the Commissioners are entitled to their costs as between solicitor and client in priority to the other parties who (with the exception of the Plaintiffs within the limits already mentioned) will add their costs to their securities.

Solicitors: *Batten, Proffitt, & Scott; Granville Smith & Co.; Kendall, Price, & Francis; Austin & Austin; H. Barnes; Woodcock, Ryland, & Parker.*

C. C. M. D.

ASHWORTH *v.* ROBERTS.

KEKEWICH, J.

1890

July 19.

[1888 A. 1857.]

Practice—Patent—Secret Process—Discovery—Account against Licensee—Names of Customers.

In an action for an account against a licensee of the Plaintiff's process, the Defendant cannot, by denying user and setting up a plea of "secret process," refuse to give the Plaintiff any discovery as to the extent to which, either alone or in combination with his own process, he has used the Plaintiff's process, the question of user being material to the issue whether an account is to be given.

Therefore in such an action, notwithstanding a denial of user and a plea of secret process, a patentee is entitled to deliver to his licensee and require answers to interrogatories framed specially with reference to his (the Plaintiff's) specification, taking it step by step, and asking whether and to what extent the Defendant has used this or that particular process claimed in the specification, and, *semble*, also to require him to give the names of some of his customers. But these interrogatories must not be used oppressively, so as to compel disclosure of the secret process.

GEORGE ASHWORTH and *Elijah Ashworth* were the patentees and proprietors of certain letters patent for "improvements in wire cards, and in the preparation and treatment of wire therefor, applicable wholly or in part in the treatment of wire for some other purposes."

They instituted this action against the Defendant *John Henry Roberts*, sued as *Godfrey Roberts & Sons*, who was licensee of their letters patent under an indenture of license, dated the 25th of February, 1887, seeking an account of all card clothing manufactured, sold, supplied, or used by him under the said indenture, and payment of what should be found due.

The Defendant by his answer denied user of the Plaintiffs' invention.

The Plaintiffs accordingly delivered interrogatories, asking generally by reference to the claiming part of their specification as to the user of their invention by him; and by the 4th interrogatory, whether he had manufactured or sold under their license the articles the subject-matter of the Plaintiffs' process,

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requiring him, if he denied such manufacture or sale, to describe the processes and apparatuses used by him for making the teeth of wire cards, for hardening and tempering the wire, and annealing or softening the wire, and how such processes and apparatuses differed from those employed by and described by the Plaintiffs in their specification.

The Defendant, in answer to this 4th interrogatory, denied that he had ever, under the Plaintiffs' license, manufactured or sold or supplied or used card clothing, composed of steel wire, hardened and tempered as described and claimed in the specification aforesaid, and stated that, prior to the 1st of October, 1886, he had invented and used for hardening and tempering steel wire for forming the dents or teeth of cards an apparatus and a process which he had not patented, but had kept secret; that he had, since the 1st of October, 1886, used the said apparatus and process, and no other, for the purpose aforesaid; that such apparatus and process was in substance and in fact different from the alleged invention described and claimed in the Plaintiffs' specification; and he declined at that stage of the proceedings to further answer this interrogatory, inasmuch as it would be a serious injury to him in his business to disclose to a rival manufacturer his secret process and apparatus, which he had used with great success; that the whole of the card clothing and hardened and tempered steel wire which he had manufactured or used or sold since the 1st of October, 1886, had been made by the process and apparatus so invented and used by him as aforesaid, and not otherwise.

The Plaintiffs, on the 22nd of May, 1890, delivered further interrogatories. These interrogatories took the processes as described in the specification, and asked the Defendant by interrogatory (1), seriatim, whether he used each particular process; by interrogatory (2), required him to state whether, if he had ever used any of the said processes, he had in using or employing the same adopted the same means with the same object, and by the use of an apparatus made or arranged as described in the Plaintiffs' specification; by interrogatory (3), asked whether at any time since the 1st of October, 1886, he had used any of the processes referred to in the 1st interrogatory as

part of the process employed by him (the Defendant) as stated in the 4th paragraph of the former answer to interrogatories by interrogatory (4), whether he had not sold or supplied steel wire, hardened and tempered according to his process or apparatus, to a particular customer, and required him to give the names and addresses of a few of his customers; by interrogatory (5), required him, if he had since the 1st of October, 1886, used any of the Plaintiffs' processes referred to in interrogatory 1, to state and describe what other or additional (if any) step, stage, or thing, or steps, stages, or things he took or did or caused to be taken or done in hardening and tempering wire according to his (the Defendant's) process; by interrogatory (6), required him to state whether he had at any time since the 1st of October, 1886, used any, and what, apparatus constructed as described in the specification; and by interrogatory (7), whether the apparatus used by him, and referred to in the 4th paragraph of his answer to interrogatories, contained any, and which, of the parts of the apparatus shewn in the drawings annexed to their specification, and required him to state which (if any) of the parts of the apparatus shewn in their specification did not form or had not formed since the 1st of October, 1886, parts of his apparatus, and also what part or parts were or had been contained in his apparatus which did or did not form part or parts of the apparatus described in the said drawings.

The Defendant declined to answer so much of the 1st, 2nd, 3rd, 5th, 6th, and 7th interrogatories as he had not already answered in his previous answers to interrogatories, for the reason that he was working under a secret process, as fully set forth in his answer to the 4th of such previous interrogatories.

And in answer to the 4th interrogatory, further admitted having sold cards having dents or teeth, hardened and tempered according to his process, and with apparatus referred to, in his answer to the 4th of the previous interrogatories, but declined at that stage to disclose the names of the customers.

The Plaintiffs on the 11th of July, 1890, gave notice of motion for the 19th of July, that the Defendant might be ordered within seven days after service of the order to make and file a full and sufficient affidavit in answer.

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The motion now came on for trial.

Moulton, Q.C., and *Chadwyck Healey*, for the Plaintiffs:—

The plea of a secret process comes under no recognised head of privilege, and the Plaintiffs are entitled to ask the Defendant step by step whether he adopts this or that specified process of theirs as part of his alleged secret process. The information asked for is relevant to the relief sought by the action, for the Plaintiffs must, to establish their right to account, prove his user of their process, and it cannot be withheld, although the Court will not allow it to be used to the Defendant's prejudice. The plea of secret process as a bar to discovery was attempted to be set up in *Renard* v. *Levinstein* (1), but unsuccessfully, and see *Badische Anilin und Soda Fabrik* v. *Levinstein* (2), *coram Pearson*, J., where his Lordship heard such defence on the part of the Defendant *in camera*.

Goodeve, for the Defendant:—

The process of hardening and tempering steel, which is the subject-matter of the Plaintiffs' invention, has been known for centuries—the only invention possible lies in the apparatus for carrying out that process. The Defendant has invented a method which he swears does not come within the Plaintiffs' process, and has denied user of any of the Plaintiffs' processes. It would be a great injury to him to be compelled to give a rival manufacturer the details of his apparatus. Then the discovery of the names of the Defendant's customers will be material only if the fact of infringement is proved, and should not be compelled now. The Defendant has already given all the information which Vice-Chancellor *Wood* in *De la Rue* v. *Dickinson* (3), says ought to be given. The Plaintiffs could gain no advantage by seeing a piece of wire sold by the Defendant—it would tell them nothing. He admits he is making and selling steel wire to a considerable extent, and if at the trial the Court should hold there to be an infringement, this discovery would be obtained under the judgment as a matter of course.

(1) 10 L. T. (N.S.) 94; 3 N. R. 665. (2) 24 Ch. D. 156, 169.
(3) 3 K. & J. 388, 391.

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KEKEWICH, J.:—

Born and bred, so to say, in Chancery, I have a leaning towards the rule adopted by the Court of Chancery of requiring full discovery. But I have at the same time a great fear in this case lest a full discovery should cause disadvantage to the Defendant, and I confess to being unwilling to direct answer after answer where I can avoid so doing.

In this case I am by no means satisfied that the Plaintiffs are entitled to all the discovery asked; but, on the other hand, I think some discovery ought to be given, and none has been given.

The present case seems to me to come within the old class of cases where a defendant in answer to interrogatories has given an insufficient answer, and has denied the bill to be true "save as aforesaid," or "except as appears by the other facts of the answer," and it has been held that the addition of the words "save as aforesaid," or "except as aforesaid," does not make the traverse sufficient (1). I think that even on this ground the Plaintiffs would succeed; but this no doubt is somewhat technical.

The question raised by this case is not one of infringement by a *tortfeasor*, but of account by a licensee, and I must decide it on that footing. What is it that it is material for a plaintiff to know to enable him to conduct his case properly at the trial? He is entitled to know under what circumstances and to what extent the defendant has used his process, and unless he has enough information to shew whether it be or not worth while to proceed to trial he has not got all the discovery which the rules say he is entitled to.

It may be—I have no wish to settle the interrogatories or answer—but it may be that when the interrogatories come to be answered, the Defendant will be able to shew some ground for refusing to give the full discovery asked. But still, he must say to what extent he has used the Plaintiffs' process. The Plaintiffs, in the first instance, asked whether he used their process by reference to the claiming part of their specification. That user being denied, and the plea of "secret process" being set up, the Plaintiffs go into more detail, and refer to the text of their

(1) See *Tipping* v. *Clarke*, 2 Hare, 388.

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specification. That is a document which may require much interpretation, and in respect of which difficulties of construction may arise. Nevertheless, the Plaintiffs are entitled to deliver these interrogatories so long as they are not oppressive, and so long as they do not compel the Defendant to disclose his secret process. I agree that the mere plea of secret process does not preclude an answer to interrogatories, but the interrogatories must not be used so as to put unfair pressure on the party interrogated. With reference to the discovery of customers' names, Mr. *Goodeve* relies on *De la Rue* v. *Dickinson* (1), a leading authority, which was decided in 1857. The marginal note is as follows: "When plaintiff's right to relief at the hearing is clear assuming the title stated by his bill, defendant, by his answer denying that title, is, in certain cases, protected from discovery. Thus, in a suit to restrain an alleged infringement of a patent, the defendant by his answer denying the fact of infringement, is protected from making any discovery immaterial to that question, and which when that question is decided would be given under the decree." That is a fair epitome of the decision; but it does not apply immediately and fully to an action like this—it does not follow that in an action for account by a patentee against his licensee, a licensee denying user is entitled to refuse to give discovery as to user, because the question of user is material to the decision whether the account is to be given at all.

An order must be made in the terms of the notice of motion, the Plaintiffs to have the costs in any event.

Solicitors: *Shaw, Tremellen & Kirkman*, agents for *A. M. Blair, Manchester; Elliott & Ash*, agents for *Rawnsley & Peacock, Bradford.*

(1) 3 K. & J. 388.

A. C. E.

KAY, J.
1890
Aug. 7.

In re FOSTER.
LLOYD *v.* CARR.

[1890 F. 1085.]

Will—Trustees—Tenant for Life — Remaindermen —Investment—Mortgage—Arrears of Interest—Principal Sum—Sale—Deficient Security—Interest and Capital—Apportionment.

A testator gave his residuary estate to trustees in trust for his widow for life, with remainder to certain persons absolutely. After his death the trustees invested £7535, part of his residuary estate, on mortgage of freehold property at £5 per cent. The trustees afterwards entered into possession and paid the rents to the widow, the tenant for life; but such rents were insufficient to keep down the interest, the arrears of which amounted at her death to £3400. Shortly after her death the trustees sold the mortgaged property; but it realized £7005 only—that is, less than the principal of the mortgaged debt:—

Held, that the £7005 should be apportioned between the executors of the tenant for life and the remaindermen, the residuary legatees, upon the basis of the following calculation: add to the £7005 the amount of income actually received by the tenant for life: divide the total between the remaindermen and the executors of the tenant for life in the proportion which the original principal, £7535, *plus* interest thereon at 5 per cent. from the death of the tenant for life to date of sale, would bear to the aggregate amount of mortgage interest (less income tax) which the tenant for life would have received during her life had it been regularly paid, the executors of the tenant for life giving credit for the amount of income she actually received.

THOMAS FOSTER, who died in the year 1836, by his will gave his residuary estate to trustees upon trust for sale and to pay the income of the proceeds to his widow, *Sarah Foster*, during her widowhood, and if she should marry again, then to pay a yearly sum to her during the remainder of her life; and after her death upon certain trusts as to the capital of the proceeds (subject to certain payments therein directed) for the absolute benefit of the testator's brothers, sisters, nephews, and nieces, as therein mentioned; and the testator gave power to his trustees to postpone the sale of his residuary estate, and also to invest trust moneys on real securities.

In 1845 and 1850 the trustees of the will invested sums

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amounting in the whole to £7535, being part of the testator's residuary estate, upon mortgage of freehold property at *Birkenhead*, bearing interest at £5 per cent. per annum. In 1862 the trustees entered into possession of this mortgaged property, and paid the rents from time to time to the testator's widow, as tenant for life until her death, but (with the exception of three years, in which such rents slightly exceeded the annual sum payable for interest) such rents were insufficient to keep down the interest, the total deficiency of interest at the widow's death being nearly £3400. The widow died on the 28th of April, 1888, and shortly afterwards the trustees sold the mortgaged property; but the sale produced £7005 only, being less than the principal mortgage money, and it was stated that nothing could be recovered from the mortgagor.

An originating summons was taken out by the trustees of *Thomas Foster's* will against the executors of the widow, tenant for life, and one of the residuary legatees, for the purpose of determining whether any and what portion of the £7005 ought to be paid to the executors of the widow, and, if so, upon what basis such portion ought to be calculated or ascertained.

H. B. Howard, for the Plaintiffs, the trustees.

Renshaw, Q.C., and *Farwell*, for the Defendants, the executors of the tenant for life:—

The principle in such cases seems to be that the loss should be apportioned between the tenant for life and the remainderman, the tenant for life receiving out of the principal sum actually realized an amount apportioned to the arrears of interest due to her: *In re Moore* (1); *Cox* v. *Cox* (2); *In re Hobson* (3).

[KAY, J., referred to *Maclaren* v. *Stainton* (4), and *In re Tinkler's Estate* (5).]

G. Henderson, for the Defendant, the residuary legatee whom his Lordship appointed to represent the class of remaindermen.

(1) 33 W. R. 447.
(2) Law Rep. 8 Eq. 343.
(3) 55 L. J. (Ch.) 422.
(4) Law Rep. 11 Eq. 382.
(5) Law Rep. 20 Eq. 456.

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KAY, J.:—

I am of opinion that the available fund should be apportioned between the tenant for life and the remaindermen, upon the basis of the following calculation: Treat the capital moneys which have been produced by the sale, and all the moneys received by the tenant for life, as the fund recovered from the mortgagees. Add them together. Then divide the total sum in this way: Estimate how much the tenant for life would have received if the mortgage interest had been regularly paid, deducting income tax. Then take the capital sum which the remaindermen would be entitled to on the supposition that the capital of the mortgage debt had been fully paid. Then divide the total between the tenant for life and the remaindermen in the proportion of these two amounts which each ought to have received; and in making that division the tenant for life should give credit for what she has actually received. If the sale did not take place until a little while after her death, then the remaindermen ought to be credited with interest during that time. For the purpose of calculation they are entitled to receive the whole amount, together with interest at 5 per cent. per annum from the death of the tenant for life. This would be a little addition to the sum which the remaindermen ought to receive.

Then it will be the sum actually recovered by the tenant for life and the remaindermen. The total will be divisible between them—the remaindermen and the tenant for life—each taking that proportion. The tenant for life must give credit for what she has actually received. With regard to the costs of the summons, each set of Defendants will bear their own costs, and they will come out of the proportion of each.

The trustees will take their costs out of the capital of this fund.

Solicitors: *Murray, Hutchins, & Stirling; G. Coldham,* agent for *Andrewes, Canham, & Co., Sudbury, Suffolk; Turner & Hacon.*

G. I. F. C.

STIRLING, J.

1890

July 31;
Aug. 6.

In re SMITH.
BILKE *v.* ROPER.

[1889 S. 3192.]

Will—Republication—Will of Married Woman in exercise of Power—Testamentary Instrument after Husband's Death—Absence of Reference to prior Will.

A married woman having a power of appointment made a will whereby she appointed the property subject to the power and all other, if any, property over which she had any power of disposition.

After her husband's death, she signed, in the presence of two witnesses, a paper which contained no reference to her will, but merely stated that certain specific property was a present to *X. Y.*, and after her death this paper was admitted to probate together with her will:—

Held, that this subsequent testamentary instrument did not constitute a republication of the will, and that the testatrix was intestate as to her property (not being separate property or within the power) other than that portion of it specifically mentioned in the instrument.

Rowley v. *Eyton* (1) explained.

Adjourned summons.

By a deed of settlement dated in November, 1864, and made upon the marriage of Mrs. *Maria Smith*, certain freehold messuages at *Dunmow* in *Essex* and *Upway* in *Dorset*, and a sum of £2000 New £3 per Cent. Annuities, were settled by her, in trust for herself during her life, and after her death in trust for her husband, *Joseph Smith*, during his life, and after the death of the survivor of them in trust for such persons as she should by deed or will appoint.

Mrs. *Maria Smith* by her will, dated the 17th of December, 1878, in exercise of the powers in the said settlement contained, appointed (after the decease of the survivor of herself and her husband) the freehold messuages at *Dunmow* to *Richard Roper* in fee, and the other messuages in trust for sale; and in further exercise of such powers she directed and appointed that the said sum of £2000 New £3 per cent. Annuities should be sold, and

(1) 2 Mer. 128.

that the proceeds of the sale, and the money arising from the sale of her real estate, and all other, if any, her moneys, property, and effects over which she had any power of disposition (except certain specified chattels) should be disposed of in manner therein mentioned.

Joseph Smith died in June, 1884; and after his death Mrs. *Maria Smith* executed an instrument in the following form:—

"*Dunmow*, July 30, 1885.

"This is a present to *Oswald Newman Roper* from his aunt, *Maria Smith*, by the express wish of his late uncle, *Joseph Smith*, a few weeks before his death, 10 shares of £10 each in the *Dunmow Gas Company*.

"*Maria Smith.*

"Witness,

"*Henry C. Smith.*

"*Eliza Clark.*"

Mrs. *Maria Smith* died on the 19th of July, 1888, and her will and the instrument of the 30th of July, 1885, were both proved at the principal registry by the executors named in the will on the 26th of September, 1888.

Besides the property comprised in the settlement, and subject to the power of appointment, Mrs. *Maria Smith* had at the date of the settlement £1000 Consols standing in her name. These remained standing in her sole name during the coverture and up to her death.

Crawley, for the Plaintiff, who was residuary legatee under the will:—

Mrs. *Maria Smith* was a married woman at the date of her will, and accordingly that will was only good to the extent to which it operated as an exercise of her powers of appointment or upon her separate estate. This being so, the question whether she was or was not intestate as to her other property depends upon whether the instrument of the 30th of July, 1885, operates as a republication by Mrs. *Smith*, after she had a complete power of disposition, of a will made while she had only a limited power of disposition, so as to make the will speak from the time of

STIRLING, J. 1890 *In re* SMITH. BILKE *v.* ROPER.

republication; and I contend that this instrument, which has been admitted to probate, constituted a republication after her husband's death of the will of Mrs. *Maria Smith*, and makes that will date as from the time of republication (*Wills Act*, s. 34), and effectual to pass all her property of whatsoever nature: *Willock* v. *Noble* (1). The case of *Du Hourmelin* v. *Sheldon* (2) was before the *Wills Act*, and is distinguishable.

[STIRLING, J.:—There the will did not do more than purport to exercise the power, and that was probably the ground of the decision.]

Any testamentary paper properly executed is a republication of a previous properly executed and existing testamentary paper, whether it refers to such previous instrument or not.

The principle of republication is that the second instrument is part of the will, and all testamentary papers admitted to probate together constitute one instrument, viz., the will of the deceased, and any paper so admitted to probate is part of the will, and none the less so because it does not expressly refer to the previous document, or state an intention to republish it.

Every codicil is *primâ facie* a republication of the will unless a contrary intention is shewn: *Jarman* on Wills (3); *Williams* on Executors (4); *Powell* on Devises (5). In *Rowley* v. *Eyton* (6) the codicil which was held to constitute a republication of the will was not described by the testator as a codicil, and contained no reference whatever to any prior will: *Skinner* v. *Ogle* (7); *Herbert* v. *Turball* (8); *Burton* v. *Newbery* (9).

There is a clear distinction between the principles applicable to questions as to the republication of a valid testamentary instrument such as this, and questions as to the revival of a revoked instrument, for which intention is now necessary, or as to the incorporation or setting up of an invalid instrument, in which case reference is essential for purposes of identification. The cases in which reference is treated as necessary are almost

(1) Law Rep. 7 H. L. 580, 591.
(2) 19 Beav. 389.
(3) 4th Ed. vol. i. p. 193.
(4) 7th Ed. vol. i. p. 211.
(5) 3rd Ed. vol. i. p. 610.
(6) 2 Mer. 128.
(7) Notes of Cases, vol. iv. 74; S. C. 9 Jur. 432; 1 Robertson, 363.
(8) 1 Keb. 589.
(9) 1 Ch. D. 234.

without exception cases of incorporation or setting up of an invalid instrument: *Burton* v. *Newbery* (1), which is so explained in *Green* v. *Tribe* (2); *Follett* v. *Pettman* (3). This distinction is pointed out in the argument of Sir *Edward Sugden* in *Gordon* v. *Lord Reay* (4).

Waggett, for one of the next of kin of Mrs. *Maria Smith*:—

I admit that, if there is a republication of a will, the will speaks from the time of the republication. But in this case the will is invalid, except so far as it was an exercise of the power of appointment under the settlement, or operated upon any separate estate; and the Court must apply the same principles as obtain in determining whether a revoked will is revived by a subsequent testamentary instrument, and must see whether that instrument shews an intention to revive the will. Here the document relied on makes no reference whatever, direct or indirect, to the will, and cannot be taken as operative to render valid for all purposes an instrument which was itself invalid in law so far as concerns the lady's own property other than separate property: *Wills Act*, s. 22; *Theobald* on Wills (5); *In the Goods of Steele* (6); *Price* v. *Parker* (7). *Herbert* v. *Turball* (8) is not in point.

[STIRLING, J.:—*Herbert* v. *Turball* does not amount to an authority that a subsequent testamentary instrument renders valid a previous invalid one without any expressed intention in that behalf.]

Herbert Robertson, for another of the next of kin:—

Burton v. *Newbery* is indistinguishable in point of principle from the present case. The instrument relied on here is not even called a codicil.

Vernon R. Smith, for the executors of the will.

Crawley, in reply.

(1) 1 Ch. D. 234.
(2) 9 Ch. D. 231, 236.
(3) 23 Ch. D. 337.
(4) 5 Sim. 274.
(5) 3rd Ed. p. 53.
(6) Law Rep. 1 P. & M. 575.
(7) 16 Sim. 198.
(8) 1 Keb. 589.

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This case raises a singular point, and one not entirely covered by authority. [His Lordship then stated the facts of the case, and continued:—]

In this document of the 30th of July, 1885, there is no reference whatever to the prior will of the 17th of December, 1878; the document is not called a codicil, and there is no attestation clause attached to it. Probate has been granted of both these instruments, and the question is whether the second testamentary instrument of the 30th of July, 1885, constitutes a republication of the will of the 17th of December, 1878.

Now, according to the decision of the House of Lords in the case of *Willock* v. *Noble* (1), it is quite clear that as regards property acquired by a married woman after the death of her husband, a will made by her during coverture would have no effect unless it was republished after the determination of the coverture.

Apart from any statutory requirements, it has long been settled that a will may be republished either by a re-execution of it, or by a codicil, and according to the notes to *Duppa* v. *Mayo* (2), "anything which shewed an intent that the will should be of a subsequent date, was a sufficient republication." The reference to the will involved in calling the subsequent instrument a codicil to it shews such an intention, and the codicil would amount to a republication of the will. The learned author of *Williams* on Executors, Mr. Justice *Vaughan Williams*, says (3): "A codicil will amount to a republication of the will to which it refers, whether the codicil be or be not annexed to the will, or be or be not expressly confirmatory of it; for every codicil is, in construction of law, part of a man's will whether it be so described in such codicil or not; and as such, furnishes conclusive evidence of the testator's considering his will as then existing."

It must, however, be borne in mind that the learned author is there, as I read his language, speaking of a codicil which refers to the will. While the long list of cases given in the note to the passage just cited forms an ample justification of the pro-

(1) Law Rep. 7 H. L. 580, 591. (2) 1 Saund. 278 (6th Ed. 1845).
(3) 7th Ed. vol. i. p. 211.

position of law which I understand to be there laid down. In every one of those cases, with one apparent exception with which I will deal presently, there appears to have been some sort of reference in the codicil to the preceding will. In most of those cases there were the usual formal words; but in some of them that did not occur. In *Serocold* v. *Heming* (1), *Richard Heming*, the testator, had written at the bottom of his will, under his name and seal affixed to the last sheet, as follows: "*London*, 16 October, 1755. I likewise give to Mrs. *Lucretia Luxford* £25 a year for her life, and to my black servant, *Peter Saville*, £10 a year for his life, the said annuities to be paid out of my estate by my executors above named. Witness my hand, *Richard Heming*.—Witness: *John Serocold*, *J. Straw*." In that case, although the will was not mentioned in terms, there was a plain reference to it, and it was held by Sir *George Lee* that the words "My executors above named" constituted "such a reference to the first will as would revive it at least as to the personal estate, which alone was in question." The case, however, which approaches the most nearly to the present case is *Rowley* v. *Eyton* (2); and according to the report the testator, after making his will, purchased several copyhold estates, which he surrendered "to such uses as he should by will or any codicil thereto appoint"; and he subsequently made a codicil to his will, also duly executed, to pass real estates in the words following: "I hereby give, devise, and bequeath unto my son, *Thomas Eyton*, and his heirs for ever, all my copyhold estates within the Manor of *Wrockwardine*." Apparently therefore there was in the codicil no reference to any prior will. I have, however, examined the Registrar's book, and I have also referred to the original will, and I find that the report does not state the whole of the codicil, and that the codicil as a matter of fact began with the formal words—"This is a codicil to the will of," &c.

Consequently none of the cases which are referred to by Mr. Justice *Vaughan Williams*, or have been cited to me, constitute an authority for what I am asked to do in this case, or support the proposition that a reference to the will is unnecessary.

(1) 2 Lee's Eccl. Rep. 490. (2) 2 Mer. 128.

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I think that the best statement of the principle on which the decisions are based is to be found in *Barnes* v. *Crowe* (1). In that case the Lord Commissioner *Eyre* says this (2): "If we disentangle ourselves from the rule, that there shall be no republication without re-execution, the principle, that a codicil, attested by three witnesses, shall be a republication, seems intelligible and clear. The testator's acknowledgment of his former will, considered as his will at the execution of the codicil, if not directly expressed in that instrument, must be implied from the nature of the instrument itself; because by the nature of it, it supposes a former will, refers to it, and becomes part of it; and being attested by three witnesses, his implied declaration and acknowledgment seems also to be attested by three. Before the statute, it was no part of the essence of the obligation, that the will should be re-executed. Anything that expressed the testator's intention, that the will should be considered as of a subsequent date, was sufficient. Since the statute re-execution of the will is not necessary; but nothing more is required than a writing, according to the provisions of the statute, expressing that intent. Therefore Lord *Hardwicke* might well say, he saw no great difference between the words, 'I desire this codicil may be part of my will,' and the words, 'I republish'; which, it was there admitted, would have done. In *Attorney-General* v. *Downing* (3) Lord *Camden* supposed a particular intent to republish ought to appear; and that annexation or particular expressions in the codicil, would demonstrate that intention. If that was necessary, not only Lord *Hardwicke's* opinion cannot stand, but neither can *Acherly* v. *Vernon* (4); for there was no particular intent to republish; but the testator referred to the will, made alterations, and gave sufficient demonstration, that when making and executing the codicil he considered the will as his will; and from that a republication was implied; but it was not particularly in his thoughts to do any formal act of republication. Upon considering these cases, I confess I am inclined to stand upon the general proposition stated by Lord *Hardwicke*, to shew the will, in the case before us, was republished."

(1) 1 Ves. 486.
(2) Ibid. 497.
(3) Amb. 573.
(4) Com. Rep. 381.

It seems to me, then, that in order that republication may be implied, something must be found in the second testamentary instrument from which the inference can be drawn that, when making and executing it, the testator "considered the will as his will." If I apply that test to the present case, I find nothing from which I can draw any such inference, and I accordingly think that this testamentary instrument does not amount to a republication of the will.

Solicitors: *H. S. Clutton*, agents for *Andrews, Son, & Huxtable, Weymouth; Guscotte, Wadham, & Daw; H. Pritchard; Paterson, Snow, & Co.*, agents for *E. Holmes, Braintree.*

W. W. K.

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—— *Page* v. *Leasingwell* (18 Ves. 463) distinguished - - - - - 66
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—— *Pollexfer* v. *Sibson* (16 Q. B. D. 792) followed
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—— *Potter* v. *Edwards* (26 L. J. Ch. 468) distinguished - - - - - 190
See MORTGAGE. 4.

—— *Rowley* v. *Eyton* (2 Mer. 128) explained 632
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—— *Sheppard* v. *Sheppard* (33 Beav. 129) considered - - - - - 126
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—— *Sudeley's (Lord) Settled Estates, In re* (37 Ch. D. 123) disapproved - - 395
See SETTLED LAND ACT. 1.

—— *Wilkinson's Mortgaged Estates, In re* (Law Rep. 13 Eq. 634) dissented from - 263
See MORTGAGE. 5.

—— *Wright* v. *Kirby* (23 Beav. 463) followed
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CHARGE OF DEBTS—Power of trustees to sell
See WILL. 3. [310

CHARITY—*Administration — Charity School — Managers—Dismissal of Schoolmaster—Injunction—Leave of Charity Commissioners before commencing Action*—4 & 5 *Vict. c.* 38, *s.* 17—*Charitable Trusts Act*, 1853 (16 & 17 *Vict. c.* 137), *s.* 17.] The master of a charity school founded under 4 & 5 Vict. c. 38 brought an action in the Chancery Division against the managers of the school for an injunction to restrain them from dismissing him from his office, and from appointing any other person to such office, and from ejecting him from the school house. The managers had purported to dismiss the plaintiff under the discretionary power conferred upon them under sect. 17 of the Act; and the question raised by the action was whether the managers had been properly appointed. The Plaintiff had not obtained, under sect. 17 of the Charitable Trusts Act, 1853, the leave of the Charity Commissioners to bring the action.—*Held*, by Bowen and Fry, L.JJ., dissentiente Cotton, L.J. (reversing the decision of Kay, J.), that although the action might incidentally involve the consideration of the deed of trust of the charity, it was not such an action as required the consent of the Charity Commissioners. —And *held*, by the whole Court of Appeal, that even if the consent of the Charity Commissioners were necessary, it was not necessary to obtain it before the commencement of the action, and that it would not be right to dismiss the action without giving the Plaintiff the opportunity of ascertaining whether the Commissioners would give their consent.—*Glen* v. *Gregg* (21 Ch. D. 513) explained. RENDALL *v.* BLAIR - C. A. 139

2. —— *Legacy—Pure Personalty—Charge on Borough Fund of Municipal Corporation—Charge on District Rate under the Public Health Act*, 1875 —9 *Geo.* 2, *c.* 36, *s.* 3.] A mortgage made pursuant to statutory powers to charge the borough fund of a municipal corporation, is only a charge on the surplus money remaining in the hands of the corporation after satisfying the purposes mentioned in sect. 92 of the Municipal Corporations Act, 1835 (5 & 6 Will. 4, c. 76), or sect. 140 of the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), and although the borough fund arises in part from rents of land, the charge does not give an interest in land within the meaning of 9 Geo. 2, c. 36, s. 3.—A mortgage was given including the district fund of a borough. The district fund was formed under the Public Health Act, 1875, the 175th section of which enacts that all surplus lands shall be sold and the proceeds carried to the district fund:—*Held*, that the section could not apply unless there were surplus lands, and that as it was not shewn that there were any, the mortgage must be treated as pure personalty.—Whether, if there had been surplus lands, the mortgage must not still have been treated as pure personalty, on the ground that as the lands were directed by statute to be sold the doctrine of election was excluded, so that the mortgagee took no interest in anything but money, *quære*.—Whether a charge which gives the holder no right against anything, except money which has gone as money into a particular fund, can ever be treated as giving an interest in real estate because the money has come from real estate, *quære*. Decision of Stirling, J., reversed. *In re* THOMPSON. BEDFORD *v.* TEAL - - - - C. A. 161

CHARITY COMMISSIONERS—Leave of, to bring action - - - - 139
See Charity. 1.

COMMISSION—Agent—Corrupt bargain - 1
See Principal and Agent.

COMPANY — *Directors — Invalid Allotment of Shares — Ratification — Principal and Agent.*] The articles of association of a company provided that the shares should be allotted by the directors, and that the first directors should be appointed by the subscribers to the memorandum of association. On the 22nd of October, 1888, the subscribers to the memorandum appointed four persons directors. On the 24th of October a meeting of directors was held, at which two only attended, and they allotted shares to A. and B., who had sent in applications. The Court subsequently held that this meeting was irregular, and that the allotments were invalid. Notice of the allotments was sent on the following day to A. and B. A. refused to pay the allotment-money on his shares; B. paid his to the bankers under protest; but the evidence failed to prove that either of them revoked his application or repudiated his shares on the ground of the allotment being invalid. On the 24th of December the company brought an action against A. for his allotment-money, and recovered judgment. On the 7th of January, 1889, another meeting of directors was held, at which two only attended, and they passed a resolution that the certificates of the shares allotted should be sealed and issued to the allottees. B. refused to accept the certificates of his shares, but did not distinctly repudiate the allotment. On the 16th of January another meeting of directors was held, at which all four directors attended, and the chairman signed the minutes of the last meeting. On the 7th of March a resolution was passed at a duly constituted meeting of the directors, formally confirming the allotment of shares made on the 24th of October. Afterwards A. and B. moved for a rectification of the register by striking out their names:—*Held* (affirming the decision of North, J.), that, although the original allotment of shares was invalid, it had been ratified by the company, and was binding on the allottees; that, with respect to A., such ratification was complete on the 24th of December, 1888, when the action against him was commenced; and that, with respect to both A. and B., there was a valid ratification on the 16th of January and the 7th of March, 1889:—*Held*, also, that having regard to the fact that neither A. nor B. had repudiated their shares on the ground of the invalidity of the allotment, the ratification in both cases was made within a reasonable time.—*Bolton Partners* v. *Lambert* (41 Ch. D. 295) followed. *In re* Portuguese Consolidated Copper Mines, Limited. *Ex parte* Badman. *Ex parte* Bosanquet - - - - - C. A. 16

2. —— *General Meeting—Notice Convening—Chairman—Amendment to Resolution—Conduct of Member—Waiver.*] The rules of a company provided that no shareholder should be qualified to vote unless he had held five shares for six months before the meeting, but the number of the votes of a qualified proprietor depended on the number of his shares, without regard to how long he had held the other shares. Notice was given of an extraordinary meeting for the 4th of April, 1889, with a view "to alter the scale of voting by giving to every qualified proprietor one vote for each share." On the 1st of April the directors circulated the resolution to be proposed, which was to the effect that every proprietor should have one vote for each share, but should have no vote for any share unless he had held it six months. H., a proprietor, attended the meeting, and proposed that to qualify a person to be a director he must have held shares for a certain period. The chairman ruled this out of order, upon which H. moved an amendment that the qualification of six months as to shareholders should be expunged. He did not put the amendment in writing, or in very clear terms. The chairman, however, understood the motion in the above sense, and asked whether any one seconded it, and, it having been seconded, he was about to put it to the meeting; but after consulting the solicitor of the company he said he was advised that no amendment could be put, and that the proposed resolution must either be accepted as it stood or rejected. He therefore refused to put the amendment. The original resolution was then passed, H. moving its rejection and voting against it. It was confirmed at a subsequent meeting, at which H. attended, and protested on the grounds that the resolution was not within the notice calling the meeting, and that the chairman had refused to put his amendment. On an action by H. to set aside the resolution on the above grounds:—*Held*, by Chitty, J., that the conduct of the Plaintiff at the meeting amounted to a waiver which precluded him from bringing an action against the company of which he was a member on the ground of any irregularity in the notice; that any member wishing to insist upon his right to move an amendment, or to protest against the ruling of the chairman, ought to formulate and put before the chairman, either orally or in writing, the terms of his amendment, and should also put the chairman on his guard, by cautioning him that his ruling was objected to, so as to give him an opportunity of reconsidering his position: and that on these grounds the Plaintiff's action failed, and must be dismissed.—*Held*, on appeal, that H. had moved an amendment which was sufficiently definite, and that the chairman was wrong in refusing to put it to the meeting. That, as the chairman after consulting the solicitor of the company had deliberately ruled that no amendment could be put, H. was under no obligation to contest that ruling or to leave the meeting, but was justified in voting against the resolution; that his so doing could not be deemed acquiescence in the ruling; and that as the chairman's refusal to put the amendment had withdrawn a material and relevant question from the consideration of the meeting, the resolution must be set aside.—Whether the resolution was within the scope of the notice calling the meeting, *quære*.—*Per* Cotton and Fry, L.JJ., *semble*, that it was. Henderson *v.* Bank of Australasia - - - C. A. 330

3. —— *Reserve Fund—Dividend—Bonus—Capital and Income—Tenant for Life.*] The memorandum and articles of association of a

COMPANY—*continued.*
company provided for increase of capital. The articles provided that the directors, with the sanction of a meeting of shareholders, might declare dividends; that, before recommending a dividend, they might set aside, out of profits, a reserve fund for contingencies, equalizing dividends, and other specified objects; and that they might declare and pay interim dividends.—Shares in the company were settled by will. At the death of the testator in 1884, there stood in the accounts of the company, to the credit of a reserve fund, £3000. By the date of the annual meeting of the company in October, 1888, the reserve fund had risen to £9000. Up to October, 1888, the shareholders had received each year, partly as "dividend," partly as "bonus," sums of various amounts: in 1888 equal to £12 10*s.* a share. In April, 1889, the directors resolved to divide £15,000 (£25 a share) as "special bonus"; and this amount was paid as "interim dividend" in April, 1889. About £5000 of extraordinary expenses were incurred, and a further dividend of £10 a share was paid in November of that year. The reserve fund was by that time reduced to £2000:—*Held*, that the tenant for life of the settled shares was entitled to the whole of the amount divided. *In re* Alsbury. Sugden *v.* Alsbury - - - - - 237

4. —— *Shares—Forfeiture—Call made, and not paid—Reallotment—Irregularity of Forfeiture—Damages in Liquidation.*] J. C., a holder of shares in a company, limited, had a call made upon him in June, 1886, which he did not pay at the time appointed by the directors; and they, by a resolution of the board, made in August, 1886, forfeited the shares, without having previously given J. C., in accordance with one of the articles of association, notice that if he failed to pay on or before the day appointed for payment they might at any time forfeit them. The directors in December, 1886, allotted the forfeited shares to numerous shareholders. The shares were at the date of forfeiture at a premium. In June, 1888, the company was ordered to be wound up. In February, 1889, J. C. applied, under another article of association, to be allowed to prove in the liquidation for damages for the irregularity of the directors in ordering the forfeiture:—*Held*, that there had been an irregularity by the directors in not giving notice to J. C., and that he was entitled to prove for damages under the article, and in competition with the other creditors of the company; sub-sect. 7 of sect. 38 of the Companies Act, 1862, not applying to the case. *In re* New Chile Gold Mining Company [598

5. —— *Winding-up—Examination of Witness—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 115—*Appeal by Witness from Order.*] The liquidator in the voluntary winding-up of a company, with leave of the Court, brought an action against another company, and obtained an order for affidavit of documents in the action; but the Court refused to order the production of documents, or the examination of the company's secretary on interrogatories, on the ground that in the present stage of the action, no defence having been put in, the discovery was premature,

COMPANY—*continued.*
The liquidator then obtained an order under sect. 115 of the Companies Act, 1862, for the examination of the secretary before an examiner. The secretary did not appeal from this order, but when examined refused to answer a question relating to the matters in issue in the action:—*Held*, that as the liquidator had shewn no reason for seeking the discovery except to assist him in the action, and so to evade the order of the Judge postponing discovery in the action, the witness was justified in refusing to answer the question.—Whether the witness might not have appealed against the original order for his examination, *quære.*—The dictum of the Judges in *In re Gold Company* (12 Ch. D. 77) questioned. *In re* North Australian Territory Company - C. A. 87

—— Savings bank—Winding-up—Liability of trustees - - - - 537
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CONSIDERATION—Mortgage—Notice to buy off
See Mortgage. 1. [553

CONTRACT—By letters—Offer and acceptance
See Vendor and Purchaser. [481

—— Illegality—Stifling prosecution - 351
See Covenant.

COPYHOLD — *Enfranchisement — Fishing, Right of—Common, Right of—Right appurtenant—Profit à prendre—Custom—Prescription—Interruption—Acquiescence — Extinguishment — "Owners and Occupiers" — Indefinite Class — Right of Action — Legal Origin—Lost Grant—Presumed Grant—River—Soil ad medium filum—2 & 3 Will. 4, c. 71, ss. 1, 4, 6.*] The practice in a manor was for the lords to grant copyholds for three lives, and to renew at a fine upon the dropping of any of the lives; but there was no custom binding them to renew. The copyhold grants did not mention a right of fishing; but from time immemorial the copyholders had enjoyed a right of angling in a stream which formed the boundary of the manor, and of passing along the bank over the lands of other tenants of the manor for that purpose. Subject to this, the right of fishing was in the lords. In 1845 the lords enfranchised a copyhold belonging to S. which adjoined the river, and released in the most ample terms all rights of fishing and all other rights they had over the enfranchised tenement. After this various other copyholds were enfranchised, and for nearly forty years the copyholders and the enfranchised copyholders exercised the same right as before of angling and going over the land of S. for that purpose. T. was the owner of several tenements formerly copyhold of the manor which had been enfranchised since 1845. In 1885 S. set up a gate and prevented T. from passing over his land to fish. T. acquiesced in the interruption until 1889, when he commenced an action, on behalf of himself and all other the owners and occupiers of copyholds or enfranchised copyholds, to establish the right of angling and of passing over the land of S. for that purpose:—*Held* (affirming Kay, J.), that by the enfranchisement deed of 1845 the lords gave up all their rights over the land of S., and that no reservation

COPYHOLD—*continued.*
or exception of a power to make to other tenants grants giving rights over that land could be implied, as there was no obligation on the lords to make such grants; that the rights given up included the reversionary right of the lords to grant rights of fishing on the expiration of the lives for which the copyholds were held; that the lords therefore had no power to give to T. by his subsequent enfranchisement deeds any rights over the land of S., and that T. had no title to maintain the action; also that lost grants of the rights to the enfranchised copyholders could not be presumed:—*Held* also, *per* Kay, J., that the interruption of T.'s alleged right, acquiesced in by him, for four years before action brought, was a bar to that right under sect. 4 of 2 & 3 Will. 4, c. 71; and that such right, being in the nature of a profit à prendre, could not be claimed by prescription on behalf of a large and indefinite class such as "owners and occupiers."—Where a privilege has been exercised as of right for a long series of years, the Court will make every presumption in favour of its legal origin, but the circumstances of the enjoyment must be carefully looked to; and as in the present case there were copyholders whose right of way and of fishing was not disputed, the Court considered the case not to stand on the same footing as if the persons exercising the privilege formed only one class.—*Per* Kay, J.:—The general law of conveyancing—that, where a riparian owner, who is also owner of the soil under the river ad medium filum, makes a grant of his land on the banks of the river, the soil ad medium filum passes by the grant—applies to land of any tenure, whether freehold, copyhold, or leasehold.—*Goodman* v. *Mayor of Saltash* (7 App. Cas. 633), as to presuming a legal origin for an immemorial usage, distinguished by Kay, J. Tilbury *v.* Silva - - C. A. 98

COSTS—Agreement as to—Mortgage—Solicitors' Remuneration Act - - - 291
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—— Further consideration - - - 126
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—— Harbour commissioners—Mortgage - 612
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—— Partition action - - - - 510
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—— Separate actions for the same object—Documents used in both - - 606
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—— Set-off of costs - - - - 318
See Practice. 3.

—— Solicitors' Remuneration Act - - 71
See Solicitor. 2.

—— Trustee—Over-payment to beneficiary 249
See Trustee.

COVENANT—*Contract—Stifling Prosecution—Indictment for obstructing Road.*] The Plaintiffs, who were a local board, brought an indictment against the Defendants for interfering with and obstructing a public road. At the trial of the indictment an agreement for compromise was made between the solicitors of both parties, and sanctioned by the Judge, and was afterwards confirmed by a deed executed by the Plaintiffs and

COVENANT—*continued.*
Defendants. By this deed the Defendants covenanted to restore the road, which they had broken up, within seven years, and the Plaintiffs covenanted that when that had been done they would consent to a verdict of "not guilty" on the indictment. The Defendants failed to restore the road, and the Plaintiffs then brought an action on their covenant, claiming specific performance and damages:—*Held* (affirming the judgment of Stirling, J.), that as the indictment was for a public injury, the agreement to consent to a verdict of "not guilty" was against public policy and illegal, and the Plaintiffs could not maintain an action on the Defendants' covenant. The action was therefore dismissed.—*Keir* v. *Leeman* (6 Q. B. 308; 9 Q. B. 371) followed.—Dictum of James, L.J., in *Fisher & Company* v. *Apollinaris Company* (Law Rep. 10 Ch. 302) not followed. Windhill Local Board of Health *v.* Vint [C. A. 351

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GOODWILL—*Sale of Business—Assignment of Goodwill to Purchaser—Right of Purchaser to use Vendor's Name.*] The Plaintiff, A. Thynne, sold his business of a baker, and the goodwill thereof, to the Defendant, who also bought, at a valuation, his stock-in-trade, which included trade cards bearing the name of "A. Thynne, Baker." The deed by which the purchase was carried out contained an assignment of "all the beneficial interest and goodwill of the said Arthur Thynne in the said trade or business;" but it contained no express assignment of the right to use the Plaintiff's name.—After the purchase the Defendant used the trade cards bearing the Plaintiff's name until they were exhausted, and then printed further trade cards bearing the Plaintiff's name as before.—In an action by the Plaintiff to restrain the Defendant from printing or publishing any such cards, or otherwise trading in the name of the Plaintiff:—*Held*, that the Defendant, by virtue of the assignment to him of the goodwill of the business, was entitled to use the name of the Plaintiff for the purpose of shewing that the business was that formerly carried on by the Plaintiff, but must not so exercise that right as to expose the Plaintiff to liability; and *held*, that, under the circumstances, an injunction must be granted to restrain the Defendant from using the Plaintiff's name in such a way as to expose him to any liability. *Levy* v. *Walker* (10 Ch. D. 436) and *Gray* v. *Smith* (43 Ch. D. 208) discussed. THYNNE *v.* SHOVE - - - - 577

HARBOUR COMMISSIONERS—*Mortgage—Costs—Action to enforce Charge and ascertain Priorities of Incumbrancers—Costs of Commissioners—Commissioners Clauses Act*, 1847 (10 & 11 *Vict. c.* 16), *s.* 60—*Costs of Plaintiff.*] A firm of solicitors who had recovered judgment against harbour Commissioners for the amount of a bill of costs, brought an action against the Commissioners in the Chancery Division for a declaration that the Plaintiffs were entitled to a charge on the property of the Commissioners, enforcement of the charge, an inquiry to ascertain and determine the other persons entitled to charges, and the rights

HARBOUR COMMISSIONERS—*continued.*
of the Plaintiffs and such persons, and for the appointment of a receiver of the Commissioners' undertaking. A receiver was appointed, and judgment given, directing an inquiry as to incumbrancers and their priorities. The Chief Clerk, in answer to the inquiry, certified the priorities, and found that the Plaintiffs were entitled to a charge subject to certain specified incumbrances and in priority to others. There was a fund in court consisting of moneys which had come to the hands of the receiver.—Upon further consideration of the action:—*Held*, that sect. 60 of the Commissioners Clauses Act, 1847, was applicable to the Commissioners, not only personally, but as a corporate body, and that, by virtue of the right of indemnity conferred by that section, the Commissioners, notwithstanding that they were in the position of mortgagors, were entitled to their costs of the action as between solicitor and client out of the fund in Court in priority to all other parties:—*Held*, also, that according to the principles established in *Ford* v. *Earl of Chesterfield* (21 Beav. 426) and *Wright* v. *Kirby* (23 Beav. 463) the Plaintiffs were entitled, in priority to the other parties except the Commissioners, to be paid out of the fund their costs of the action, so far as the other parties except the Commissioners had had the benefit thereof in securing the fund in Court and ascertaining and determining the rights of the parties to it. BATTEN, PROFFITT & SCOTT *v.* DARTMOUTH HARBOUR COMMISSIONERS - - - - 612

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HUSBAND AND WIFE—*Married Women's Property Act*, 1882 (45 & 46 *Vict. c.* 75), *s.* 5—*Contingent Title—Spes successionis—Nemo est hæres viventis—Contingent Interest or mere Expectancy—Gift to possible Next of Kin of a Person who is supposed to Die at a future Time.*] A spes successionis is not a title to property by English law. A woman, married before the Married Women's Property Act, 1882, who has a mere spes successionis to property, as one of a class of possible next of kin, has not a "contingent title" within the meaning of sect. 5 of that Act.—A testator, who died in 1879, bequeathed a sum of money to trustees, upon certain trusts, and subject thereto in trust for "such person or persons as at the time of the failure of the preceding trusts would be my next of kin, and entitled to my personal estate under the statutes for the distribution of the personal estates of intestates, if I had then died intestate." The preceding trusts failed on the 21st of May, 1886. A woman, married in 1857, was one of the persons who would have been next of kin of the testator if he had died on the 21st of May, 1886. She made a will, dated in 1889, and died in the same year leaving her husband surviving:—*Held*, that the property of the married woman under the gift in favour of the testator's next of kin first accrued to her in title and interest on the 21st of May, 1886, and that, therefore, under sect. 5 of the Married Women's Property Act, 1882, she was entitled to it for her separate use,

HUSBAND AND WIFE—*continued.*
and it passed under her will.—*In re Beaupré's Trusts* (21 L. R. Ir. 397) discussed and dissented from.—The difference in legal effect between a gift to the "children" or "nephews," or "kindred" of A. who shall be living at his death, and a gift to the persons who shall then be his statutory next of kin, considered and explained. *In re* Parsons. Stockley *v.* Parsons - 51

—— Liability of wife to be sued—Married Women's Property Act - - 320
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IMPLICATION — Gift over on death without leaving children - - - 299
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INFANT—*Apprenticeship Deed—Validity—Unreasonable Provisions.*] By an apprenticeship deed between an infant, her parent, and the Plaintiff, the infant was bound apprentice to the Plaintiff for seven years, to be taught stage dancing, upon certain terms, by one of which the infant contracted that she would not accept any professional engagement or contract matrimony during the said term without the consent of her master. The deed also contained mutual covenants by the master and the parent that the master would properly instruct the infant, and make certain payments to her for all dancing engagements in this country and in foreign or colonial countries; in return for which the infant's services were to be entirely at the disposal of the master. But there was no stipulation that the master should provide engagements for the infant or maintain her while unemployed. There was also a provision that the master might put an end to the apprenticeship if the infant should be found after fair trial unfit for the work of stage dancing, or should break any of the engagements of the deed, or in any way misconduct herself. The infant having made a professional engagement with the Defendant B., the Plaintiff brought an action against B., the infant, and her parent, to enforce the provisions of the deed and for damages for breach of it:—*Held*, that the provisions of the deed were unreasonable, and could not be enforced against the infant or her parent; and consequently that no action would lie against B. for enticing her away from the Plaintiff's employment. De Francesco *v.* Barnum 430

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LANDLORD AND TENANT — *Agreement for Lease—Usual Covenants—Proviso for re-entry—Non-payment of Rent—Conveyancing and Law of Property Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 14.] A., in consideration of £230, agreed to grant to B. a lease for seventy years at an annual ground rent of £12 12*s.*, payable quarterly, "subject to the usual covenants to insure from loss by fire, repair, and pay rent and all outgoings that may be charged on the property and ground."—The lease as prepared and settled by the conveyancing counsel contained a proviso for re-entry, not only for non-payment of the rent but also for the breach of any of the clauses, covenants, conditions, and assignments in the lease:—*Held*, that the proviso for re-entry ought only to be made to extend to the non-payment of rent.—The law on the subject is still the same as laid down by James, L.J., in *Hodgkinson* v. *Crowe* (Law Rep. 10 Ch. 622), and has not been altered by the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 14. *In re* Anderton and Milner's Contract - - - - 476

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LETTER—Contract by - - - 481
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LIFE ASSURANCE COMPANY—*Deposit—Amalgamation—Repayment of Deposit—Life Assurance Companies Act*, 1870 (33 & 34 *Vict. c.* 61), *s.* 3—*Life Assurance Companies Act*, 1872 (35 & 36 *Vict. c.* 41), *s.* 7.] The E. Life Assurance Society made the deposit of £20,000 required by the Life Assurance Companies Act, 1870, sect. 3, but did not accumulate a life assurance fund out of premiums as mentioned in the section. The E. Society effected an amalgamation with the M. Life Assurance Company, which had accumulated out of premiums previously received a fund exceeding £100,000. There were no creditors of the E. Society other than the policy-holders, nearly all of whom had agreed to accept the liability of the M. Company. Upon a petition by the E. Society and M. Company for payment of the deposit to the M. Company:—*Held*, that as there had not been an accumulation of a life assurance fund out of the premiums received by the E. Society, the provisions of the section had not been complied with, and the order could not be made.—The Court allowed the petition to stand over generally, intimating that it might be brought on again, when the M. Company had accumulated out of the premiums to be received

LIFE ASSURANCE COMPANY—*continued.*
on all or any of their policies an additional life assurance fund amounting to £40,000. *Ex parte* SCOTTISH ECONOMIC LIFE ASSURANCE SOCIETY - - - - - - 220

LIMITATIONS, STATUTE OF—*Breach of Trust—Following Assets—Trustee Act*, 1888 (51 & 52 *Vict. c.* 59), *s.* 8—*Parties—Trustee representing Beneficiaries—Rules of Supreme Court*, 1883, *Order XVI., r.* 8.] A newly appointed trustee of a will brought an action against an old trustee and the representatives of two deceased trustees to compel them to make good losses arising from investments negligently made on insufficient security more than six years before the action. R. G., the executor of D. G., one of the deceased trustees, had after D. G.'s death issued the proper statutory advertisements and administered the estate, retaining in hand two legacies which had been bequeathed to him on trust. By leave of the Court at the trial the statement of claim was amended to make it a claim against R. G. as trustee of the legacies and to follow the legacies into his hands, R. G. to be at liberty to claim the benefit of any statutes of limitation:—*Held*, that having regard to Order XVI. r. 8, the cestuis que trust of the legacies were not necessary parties to the action.—*Held*, that sect. 8, sub-sect. 1 (*a*) of the Trustee Act, 1888 (51 & 52 Vict. c. 59), did not apply to the case, but that sect. 8, sub-sect. 1 (*b*) did apply; that under it R. G. was entitled to plead the lapse of time as he might have done in an action of debt, and that, as the cause of action had accrued more than six years before the action, R. G. had a good defence. *In re* BOWDEN. ANDREW *v.* COOPER - - - - 444

——Interest—Mortgage of reversion - 225
See MORTGAGE. 3.

LOCAL GOVERNMENT ACT—(51 & 52 *Vict. c.* 41), *s.* 11, *sub-ss.* 1, 6—*Main Road*—"*Vest*"—"*Roadside Wastes*"—*County Council.*] Strips of grass bordering the metalled part of a main road are "roadside wastes," within the meaning of sect. 11, sub-sect. 1, of the Local Government Act, 1888. The herbage on such strips is not vested in the county council by virtue of sect. 11, sub-sect. 6, of that Act.—C. was tenant for life of the manor which included the waste land adjoining the highways in the parish of S. The metalled part of a main road through S. was bordered by strips of grass with some timber on them. The county council sold the grass by the sides of the main road to T. for a year. At the instance of C. and his tenants, an injunction was granted to restrain the county council from cutting and removing the grass, timber, and other growths from the sides of the main road. CURTIS *v.* KESTEVEN COUNTY COUNCIL - - 504

2. ——*Street Improvement—Expenses of Metalling and Paving a Road—Charge upon Premises—Premises subject to Restrictive Covenant—Sale to satisfy Charge free from Covenant.*] The charge for expenses of street improvements created by sect. 257 of the Public Health Act, upon premises in respect of which such expenses have been incurred by a local authority acting under sect. 150 of the Act, is an overriding charge upon the whole proprietorship of such premises; and

LOCAL GOVERNMENT ACT—*continued.*
premises subject to a covenant restricting the owner thereof from building thereon may, for the purpose of satisfying such charge, be ordered to be sold free from such restrictive covenant. GUARDIANS OF TENDRING UNION *v.* DOWTON - - - - - - 583

MAXIM OF LAW—Nemo est hæres viventis 51
See HUSBAND AND WIFE.

MEETING OF SHAREHOLDERS—Notice—Irregularity - - - - 330
See COMPANY. 2.

MINERALS—Reservation of—Sale by mortgagee—Petition for sanction of Court - 263
See MORTGAGE. 5.

MORTGAGE—*Consolidation—Notice by Mortgagees under sect.* 20 *of the Conveyancing and Law of Property Act*, 1881, *to pay off one Mortgage—Election—Debenture-holders of one Equity of Redemption purchased by a Company limited—Numerous Parties—Costs*—15 & 16 *Vict. c.* 86, *s.* 42—*Rules of Supreme Court*, 1883, *Order XVI., r.* 9: *Order LV., rr.* 5*a and* 5*b.*] Mortgagees holding several mortgages executed by the same mortgagor, who have excluded the 17th section of the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), are entitled to consolidate, although they have given notice under sect. 20 to the mortgagor to pay off one of the mortgages in order to acquire a power of sale, and the mortgagor has prepared for the payment and tendered the money, the doctrine of election having no application.—Where the equity of redemption in one of the mortgages had been purchased by a company limited, and the company had issued debentures to a large amount which were a charge on the mortgaged property, it was held that all the debenture-holders, having an interest in the equity of redemption, must be made parties to a foreclosure action, and not merely some as representatives of the whole, under Rules of Supreme Court, 1883, Order XVI., rule 9. GRIFFITH *v.* POUND - - - - 553

2. ——*Equitable Mortgage—Real Estate—Conflicting Equities—Notice—Priority.*] A solicitor having in 1883 received from a client a sum of money for investment represented to the client that he had invested it on a specified mortgage, whereas in fact the mortgage specified was one previously taken by the solicitor in his own name.—The solicitor paid interest on the amount of the specified mortgage debt to the client, down to the client's death in 1885, and to the client's executors down to his own death in 1888.—Shortly before his death the solicitor deposited the title deeds of the mortgaged property with his own bankers to secure the overdraft of his account; and he died leaving his account overdrawn to an extent exceeding the value of the mortgaged property.—Immediately after the solicitor's death the bank gave notice to the mortgagors of the deposit of the deeds with them. At the date of the deposit the bank had no notice of any claim on behalf of the client, and their notice was prior in point of date to any notice given the executors of the client:—*Held*, (1.) that the solicitor was a trustee for his client of the mortgage specified,

MORTGAGE—*continued.*
and that there was no negligence on the part of the client, or of his executors sufficient to deprive them of the prior equity; and (2.) that the principle of *Dearle* v. *Hall* (3 Russ. 1) did not apply, and that the bank were not entitled to any priority by reason of their notice to the mortgagors being prior in point of time to that of the executors. *In re* Richards. Humber *v.* Richards - - 589

3. —— *Interest—Arrears—Reversionary Interest in Personal Estate—Covenant to pay Principal and Interest on Specified Day, but no Covenant for Payment of Subsequent Interest*—3 & 4 *Will.* 4, *c.* 27, *s.* 42.] A mortgage of reversionary interests in personal estate contained a covenant by the mortgagor for payment of the mortgage money with interest at 5 per cent. on a specified day; but there was no provision for payment of any subsequent interest. No interest was ever paid. Fourteen years after the date of the mortgage an action was brought for foreclosure and the usual decree was made:—*Held*, that redemption could only be allowed on payment of interest at 5 per cent. for the whole period of fourteen years. Mellersh *v.* Brown - - 225

4. —— *Policy of Insurance—Right to Policy Money—Fetter on Redemption.*] An insurance society advanced £10,000 to C. on the security of a reversionary interest to which C. was entitled contingently on his surviving W. In accordance with the contract between the parties, the society insured the life of C. against that of W. for £34,500 in their own office, and provided the premiums down to the death of C. The reversion was charged with principal, premiums, and compound interest on principal and premiums. It was stipulated that in the event of C. dying in the lifetime of W., the proceeds of the policy of insurance should belong to the society absolutely. C. died in the lifetime of W.:—*Held*, by the Court of Appeal (dissentiente Bowen, L.J.), affirming the decision of North, J., that the stipulation was void, and the administrator of C. was allowed to redeem the £34,500.—*Potter* v. *Edwards* (26 L. J. (Ch.) 468) distinguished. Marquess of Northampton *v.* Pollock - - - C. A. 190

5. —— *Power of Sale—Sale reserving Minerals—Petition for Sanction of Court—Service on Mortgagor*—25 & 26 *Vict. c.* 108, *s.* 2.] A petition by a mortgagee of land, under sect. 2 of the Act 25 & 26 Vict. c. 108, for the sanction of the Court to his selling the surface of the mortgaged property with a reservation of the mines and minerals thereunder, must be served on the mortgagor.—Opinion of Wickens, V.C., in *In re Wilkinson's Mortgaged Estates* (Law Rep. 13 Eq. 634) dissented from. *In re* Hirst's Mortgage - 263

—— Solicitor—Agreement as to costs - 291
See Solicitor. 1.

—— Harbour commissioners—Costs - 612
See Harbour Commissioners.

MORTMAIN - - - - - 161
See Charity. 2.

NEXT OF KIN—Gift to—Contingent interest a mere expectancy - - - 51
See Husband and Wife.

NOTICE—Mortgage—Priority - - 589
See Mortgage. 2.

—— To pay off mortgage—Consolidation 553
See Mortgage. 1.

PARTIES — Foreclosure Action — Debentureholders - - - - 553
See Mortgage. 1.

PARTITION ACTION—*Practice—Costs—Incumbered Shares—Discretion of Court—Partition Act*, 1868 (31 & 32 *Vict. c.* 40), *s.* 10.] Under sect. 10 of the Partition Act, 1868, the Court has an absolute discretion as to the costs of a partition action up to the trial; but as a general rule it will order those costs to be borne by the whole estate—that is, by each share in proportion to its value, the shares for this purpose being ascertained at the date of the Chief Clerk's certificate.—The Plaintiffs in a partition action were entitled to a moiety of the estate, subject to some mortgages. The Defendants were entitled to the other moiety, upon which there was no mortgage. The estate having been sold:—*Held*, that the costs of all parties, including those of the mortgagees, must be paid first out of the proceeds of sale.—There is no fixed rule in partition actions (as there is in administration actions) that only one set of costs will be allowed in respect of each share of the property.—The authorities as to the costs of a partition action reviewed. Belcher *v.* Williams - - - - 510

PARTNERSHIP — Foreign service of writ on manager - - - - 231
See Practice. 9.

PATENT—*Practice—Secret Process—Discovery—Account against Licensee—Names of Customers.*] In an action for an account against a licensee of the Plaintiff's process, the Defendant cannot, by denying user and setting up a plea of "secret process," refuse to give the Plaintiff any discovery as to the extent to which, either alone or in combination with his own process, he has used the Plaintiff's process, the question of user being material to the issue whether an account is to be given.—Therefore in such an action, notwithstanding a denial of user and a plea of secret process, a patentee is entitled to deliver to his licensee and require answers to interrogatories framed specially with reference to his (the Plaintiff's) specification, taking it step by step, and asking whether and to what extent the Defendant has used this or that particular process claimed in the specification, and, *semble*, also to require him to give the names of some of his customers. But these interrogatories must not be used oppressively, so as to compel disclosure of the secret process. Ashworth *v.* Roberts - - 623

2. ——*Validity Amendment of Specification—Patents, Designs, and Trade Marks Act*, 1883 (46 & 47 *Vict. c.* 57), *s.* 18.] A patent was granted for "a telescope ladder for domestic and other purposes." The invention consisted of two distinct ladders of equal length, one drawing up out of the other by pulling a cord, both ends of which were attached to the inner or sliding ladder, which could be adjusted at any height by means of a lever bracket, on which any of the steps of the sliding ladder could rest, thus keeping that

PATENT—*continued.*

ladder fixed in its place.—The specification claimed—"(1.) The two ladders occupying the space of one only. (2.) The ready means of working by the cord. (3.) The simple bracket lever by which the ladder is secured at any required length." The patentee afterwards obtained leave to amend his specification, and he amended it by striking out the whole of the claims numbered (1), (2), (3), and substituting for them the following as his claim: "The combination in a telescope ladder as herein described of means for raising, lowering, and stopping, all as herein described, and shewn in accompanying drawings." In an action for the infringement of the patent:—*Held*, upon the construction of the whole specification as it stood before the amendment, that the claim was really for a combination, and that, consequently, the amendment was only a "correction or explanation," wifhin the meaning of sect. 18 of the Patents, Designs, and Trade Marks Act, 1883, and did not "make the specification, as amended, claim an invention substantially larger than or substantially different from the invention claimed by" the original specification, and that, consequently, the amendment did not render the patent invalid. KELLY *v.* HEATHMAN - - 256

PAVING EXPENSES—New street - - 583
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PETITION—Sanction of Court—Sale by mortgagee reserving minerals—Service on mortgagor - - - - 263
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POLICY OF INSURANCE—Mortgage—Right to policy money - - - 190
See MORTGAGE. 4.

POWER—*Appointment—Real Estate—Particular Power—Excessive Execution—General Words—Power to Appoint among Children in Tail—Appointment of Life Estate.*] By a family partition deed of the 5th of September, 1837, a general power of appointment over real estate was given to a husband and wife. By a deed of the 9th of September, 1837, they exercised that power by appointing to themselves successively for life, with remainder to such of their children in tail, and in such manner, as they should by deed appoint, with remainder to the children as tenants in common in tail.—By a deed in 1855, after reciting the deed of the 5th of September, 1837, but not the deed of the 9th of September, 1837, and reciting their intention to exercise the power in the deed of the 5th of September, the husband and wife, in exercise of that power, "and of every other power or authority enabling them in that behalf," purported to appoint the property to themselves successively for life, with remainder to their son E. for life, with remainder over in favour of E.'s issue.—The husband and wife subsequently died, leaving several children besides E.:—*Held* (affirming North, J.), that the power in the deed of the 9th of September, 1837, was not exercised by the deed of 1855; and further that the power authorized neither an appointment to E.'s issue (which was in fact admitted) nor an appointment of a life estate to E.—*Per* Lindley, L.J.:—A power to appoint real estate among children in tail does not authorize an appointment to one of those children for a lesser estate, such as an estate for life. *In re* PORTER'S SETTLEMENT. PORTER *v.* DE QUETTEVILLE [C. A. 179

2. —— *Appointment—Will—Objects of Power designated Nominatim—Gift over to same Objects in Default—Death of one Object in Lifetime of Donee of Power—Validity of Power—Exclusive or Distributive Power—Representatives.*] Where power is given by will to appoint a fund among several objects, with a gift, in default of appointment, to the same objects nominatim, and all the objects survive the testator, the power remains as to the whole fund, notwithstanding the death of one of the objects in the lifetime of the donee of the power.—The doctrine of *Boyle* v. *Bishop of Peterborough* (1 Ves. 299) applied.—In the absence of sufficient evidence in the will to the contrary, "representatives" must be construed in its ordinary and primary meaning of "legal personal representatives."—*In re Crawford's Trusts* (2 Drew, 230) applied. *In re* WARE. CUMBERLEGE *v.* CUMBERLEGE-WARE - - - 269

POWER OF SALE—Mortgage - - 263
See MORTGAGE. 5.

—— Trustees—Charge of debts - - 310
See WILL. 3.

PRACTICE—*Consent Order—Withdrawal of.*] Although a compromise entered into by counsel under the authority implied by their employment is binding on the client, and cannot be upset by the Court, a compromise entered into in intended pursuance of terms consented to by the client but by misapprehension not strictly following them, is not binding on the client.—*Matthews* v. *Munster* (20 Q. B. D. 141) distinguished. LEWIS'S *v.* LEWIS [281

2. —— *Costs—Further Consideration—Order to pay Costs out of Cash in Court—Adjustment of Costs at time of Distribution.*] A testatrix bequeathed a mixed fund of pure personalty and money to arise from realty directed by her will to be sold, to A. for life, and then to a charity. In a suit to administer the estate, an order on further consideration was made, which directed the costs of suit and certain legacies to be paid out of four sums of cash in Court, two of which arose from realty, and two from pure personalty, so far as they would extend, the deficiency to be raised out of a sum of stock in Court which represented realty. There was no reservation of subsequent further consideration nor of the question how the costs should ultimately be borne. The dividends on the residue of the fund were ordered to be paid to A. for life with liberty to apply. On A.'s death the testatrix's heir-at-law petitioned for the payment of the fund to him as being realty. The Attorney-General, for the charity, objected that the costs of administering the real estate ought to have been paid out of the proceeds of real estate, in which case there would have been left a substantial sum of pure personalty which the charity could take. Kay, J., considered that the order on further consideration settled the question how the costs were to be borne, and ordered payment of the fund to the heir. The Attorney-General appealed:—*Held*,

PRACTICE—*continued.*

by Cotton and Bowen, L.JJ., that the costs of administering the realty ought to have been paid out of the proceeds of realty, and that as the order on further consideration contained no declaration as to the ultimate incidence of the costs and did not indicate any intention to decide that question, the application of the sums of cash in payment of costs and legacies must be treated as directed for convenience without any intention to alter the rights of the parties, and that as the fund was still in hand, the Court, although there was no express reservation of the ultimate incidence of the costs, ought now to set the matter right:—*Held*, by Fry, L.J., that an order on further consideration which directs payment of costs in a particular way, and does not reserve subsequent further consideration nor reserve the question how the costs are ultimately to be borne, ought to be treated as final.—*Sheppard* v. *Sheppard* (33 Beav. 122) considered. *In re* Roper. Taylor *v.* Bland - - - C. A. 126

3. —— *Costs—Set-off of Costs—Rules of Supreme Court*, 1883, *Order* lxv., *r.* 27, *sub-r.* 21.] A party, who under a former order in the action was entitled to certain costs out of the estate, appealed from an interlocutory order, and his appeal was dismissed with costs. The Respondent asked that under Order lxv., rule 27, sub-r. 21, these costs might be set off against the costs which the Appellant was entitled to receive, the certificate of the taxation of which was ready for signature. The Court declined to order set-off, but directed that no costs should be paid out to the Appellant for a fortnight, so as to give the Respondent time to carry in his bill of costs of the appeal, that the set-off might be considered by the Taxing Master. *In re* Crawshay. Dennis *v.* Crawshay - - - - - 318

4. —— *Receiver—Creditors' Administration Action—Executor—Right of Retainer.*] The Court will not interfere with an executor's right of retainer by appointing a receiver at the instance of the Plaintiff in a creditor's administration action merely because the executor will probably exercise his right to the prejudice of the general body of creditors, nor unless it is shewn that the assets are being wasted. *In re* Wells. Molony *v.* Brooke - - - - - 569

5. —— *Separate Actions—Both parties represented by one Solicitor—Costs—Taxation—Documents—Correspondence—Duplicate Copies—Counsel's Fees—Disallowance—Discretion—Rules of Supreme Court*, 1883, *Order* lxv., *r.* 27, *sub-r.* 8.] Where the successful Plaintiffs in two separate and independent actions against the same Defendant, for the same object, and supported mainly by the same evidence, and in which there has been no order or agreement that the result of one shall govern the other, have been represented by the same solicitor and the same counsel, the Plaintiff in each case is entitled, on the taxation of his costs of his action, to have his own action treated as entirely distinct from and independent of the other, and to have the same allowances as if the two actions had been conducted by separate solicitors and counsel, except as regards attendances or other matters which were or ought to have been done at one and the same time in both

PRACTICE—*continued.*

cases.—Thus, where charges for copies of documents and correspondence have been allowed on taxation in the one action, the Taxing Master ought not under Rules of Supreme Court, 1883, Order lxv., r. 27, sub-r. 8, to disallow charges for copies in the other action merely because the copies in the one action might have been used in the other; nor ought he to reduce the charges for counsel's fees in the latter action.—*Oppenshaw* v. *Whitehead* (9 Ex. 384) followed. *In re* Metropolitan Coal Consumers' Association - 606

6. —— *Third Party Notice—Rules of Supreme Court*, 1883, *Order* xvi., *rr.* 48, 55—*Order* lv., *rr.* 3 *to* 8—*Originating Summons.*] A third party notice is not applicable to proceedings by originating summons. *In re* Wilson. Attorney-General *v.* Woodall - - - 266

7. —— *Writ—Leave to Issue—Injunction—Trade-mark—Infringement—Service out of Jurisdiction—Irish Action—Irish Firm—English Firm—Rules of Supreme Court*, 1883, *Order* xi., *rr.* 1 (*f*), 2—*Rectification—Pending Motion—English Proceedings—Patents, Designs, and Trade Marks Act*, 1883, *ss.* 90, *sub-s.* 1, 110, 111, 117.] An action was brought in England, by a firm having places of business in Dublin and London, to restrain the Defendants, a limited company, having its registered office in Belfast, from infringing the Plaintiffs' trade-mark by the sale of goods under a similar trade-mark in England.—The Defendants had no agents or depots in England, but supplied occasional customers in England direct from Belfast. A motion was also pending in England by the Plaintiffs, under sect. 90 of the Patents, Designs, and Trade Marks Act, 1883, to expunge the Defendants' trade-mark, and it was proposed by the Plaintiffs that the action and motion should come on together:—*Held*, that the action was to be regarded as practically an Irish and not an English action; and an order obtained ex parte by the Plaintiffs, under Rules of Supreme Court, 1883, giving them leave to issue and serve the writ out of the jurisdiction, was, notwithstanding the pending motion to expunge, discharged with costs. Kinahan *v.* Kinahan - - - - - 78

8. —— *Writ — Service — Defendants sued in Name of Partnership Firm—Foreign Partner—Service on Manager—Rules of Supreme Court*, 1883, *Order* ix., *r.* 6; *Order* xvi., *r.* 14.] A writ was issued against a partnership firm of H. P. & Co., and was served in London under Order ix., rule 6, on the manager, at the place where the business of H. P. & Co. purported to be carried on.—H. was a foreigner domiciled in France, and P. a British subject resident here.—H. moved to discharge the service of the writ on the ground that the partnership of H. P. & Co. had been dissolved to the knowledge of the Plaintiff some time before the issue of the writ, and moreover that he (H.) was a foreigner domiciled in France.—Upon the evidence, the Court arrived at the conclusion that the dissolution of the partnership had not come to the knowledge of the Plaintiff prior to the commencement of the action:—*Held*, that under Order ix., rule 6, coupled with Order xvi., rule 14, service on the manager at the place of business was good service on H. & P. not-

PRACTICE—*continued.*
withstanding the fact of H. being a foreigner domiciled abroad.—Service on one partner within the jurisdiction is good service on all the partners, although the partnership is a foreign partnership and all the partners reside and are domiciled out of the jurisdiction.—*Pollexfen* v. *Sibson* (16 Q. B. D. 792) discussed and followed. Shepherd *v.* Hirsch, Pritchard & Co. - 231
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PRINCIPAL AND AGENT—*Corrupt Bargain by Agent for Commission—Investment of such Moneys by Agent—Following Moneys—Money had and received.*] The Plaintiffs, a manufacturing company, employed the Defendant, who was their foreman, to buy for them certain materials which they used in their business; and the Defendant, under a corrupt bargain, took from one of the firms of whom he so bought large sums by way of commission, a portion whereof he invested. The Plaintiffs brought an action against the Defendant to recover the moneys so paid to him, claiming to be entitled to follow such moneys into the investments thereof; and they moved for an injunction to restrain the Defendant from dealing with the investments or for an order directing him to bring the moneys and the investments into Court:—*Held* (affirming the judgment of Stirling, J.), that the relation between the Defendant and the Plaintiffs was that of debtor and creditor, and not that of trustee and cestui que trust, and that the Plaintiffs were not entitled to the order. Lister & Co. *v.* Stubbs - C. A. 1
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RAILWAY COMPANY—*Receiver and Manager—Application of Moneys in hands of Receiver—"Working Expenses and Proper Outgoings"—Railway Companies Act*, 1867 (30 & 31 *Vict. c.* 127), *ss.* 4, 23.] When a receiver of the undertaking of a railway company has been appointed in pursuance of sect. 4 of the Railway Companies Act, 1867, the moneys received by him must be applied first in providing for the "working expenses" of the railway, even if by the company's special Act a fixed dividend on shares and the interest on debentures, forming the capital raised for a particular undertaking of the company, are charged on the gross receipts of that undertaking:—When a railway company has purchased rolling stock on the terms of paying for it by a series of instalments at fixed times, the stock not becoming the property of the company until the complete payment of all the instalments, and the vendor having the right to seize the stock on default in payment of any one instalment, the "working expenses" include such instalments as

RAILWAY COMPANY—*continued.*
they become due, and also overdue instalments.—By virtue of a special Act of a company a certain loop line was constituted a "separate undertaking," and the capital raised for the purpose of constructing the loop line was constituted "separate capital." A receiver having been appointed under sect. 4 of the Railway Companies Act, 1867:—*Held* (by Kay, J., and the Court of Appeal), upon the construction of the special Act as a whole, that the dividend upon, and interest in respect of, the separate capital were not "working expenses" or "proper outgoings" within the meaning of sect. 4, and were to be postponed to working expenses. *In re* Eastern and Midlands Railway Company - - - C. A. 367
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SETTLED LAND ACT—*Application of "Capital Moneys"—Redemption of Terminable Rent-charge—Payment of Bonus for Redemption—Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *s.* 21—*Settled Land Acts (Amendment) Act*, 1887 (50 & 51 *Vict. c.* 30), *s.* 1.] *Held*, that, by sect. 1 of the Settled Land Acts (Amendment) Act, 1887, the trustees of a settled estate are authorized to apply "capital moneys" in redeeming a terminable rent-charge, granted in consideration of money borrowed for the purpose of effecting improvements on the estate, by paying not only the balance of principal remaining unpaid, but also a reasonable and proper sum by way of bonus to compensate the lender for loss of interest by reason of the redemption.—Decision of North, J., reversed.—Decision of Kay, J., in *In re Lord Sudeley's Settled Estates* (37 Ch. D. 123) disapproved. *In re* LORD EGMONT'S SETTLED ESTATES [395

2. —— *Heir-looms—Sale by Tenant for Life—Discretion of Court to allow Sale*—(45 & 46 *Vict. c.* 38), *ss.* 37, 53.] In exercising the power of sale of heirlooms conferred upon a tenant for life of settled estate by sect. 37 of the Settled Land Act, 1882, the tenant for life is, by force of sect. 53, in the position of a trustee with a discretionary power to sell, and must have regard, not to his own interests alone, but to the interests of all persons entitled under the settlement, the interest of those more remotely entitled being of less weight than the interest of those nearer to the succession.—The Court, in giving its sanction to any such proposed sale, must in the exercise of its judicial discretion be satisfied that, under the circumstances of each particular case, the sale is reasonable and proper, having regard to the interests of all parties entitled. *In re* EARL OF RADNOR'S WILL TRUSTS - - - 402

SETTLEMENT—*Covenant to settle Wife's Property — Defeasible Reversionary Interest.*] A marriage settlement contained a covenant by the husband for the settlement of all personal estate which at any time during the coverture should come to or "vest" in him in right of his intended wife or in her by bequest, gift, or otherwise:—*Held*, that a reversionary interest in a legacy in default of appointment, which vested in the wife during the coverture, though liable to be divested by the exercise of the power of appointment, was included in this covenant. *In re* WARE. CUMBERLEGE *v.* CUMBERLEGE-WARE - - 269

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SOLICITOR—*Bills of Costs — Mortgage—Agreement as to Costs—Solicitors' Remuneration Act*, 1881 (44 & 45 *Vict. c.* 44), *s.* 1, *sub-s.* 3; *s.* 8, *sub-ss.* 1, 4—"*Client*"—*Employment of Solicitor.*] S., being desirous of borrowing money on mortgage, wrote to P., a solicitor, a letter instructing him to raise £300 upon a specified security, and undertaking "to pay your costs (which I agree at £20, exclusive of money out of pocket) to be incurred in and about doing what is necessary for the purpose of these instructions." P. found a mortgagee and carried out a mortgage, acting on

SOLICITOR—*continued.*

behalf of both the mortgagor and the mortgagee, and retained out of the £300 £20 for costs of both parties, other than out of pocket costs. S. then applied for an order directing P. to deliver a bill of all such fees, charges, and disbursements as he claimed or had deducted, and referring such bill when delivered to taxation:—*Held*, first, that S., the mortgagor, was a "client," and had employed P. as his solicitor, within the meaning of sect. 1 of the Solicitors' Remuneration Act, 1881; secondly, that although the £20 was partly in respect of business in which the solicitor was acting on behalf of the mortgagee, the letter was an agreement for remuneration between client and solicitor within the 8th section of the Act; and thirdly, that in the absence of evidence that the charge of £20 was either unfair or unreasonable it ought not to be referred for taxation. *In re* PALMER - - - - - 291

2. —— *Bill of Costs—Taxation—Scale Fee—Lease in consideration of Rent and Premium—General Order under Solicitors' Remuneration Act, 1881, Sched. I., Part II., rr. 1, 5.*] When a lease is granted in consideration partly of a premium and partly of a rent, the lessor's solicitor is, under rule 5 in Part II. of Sched. I. to the Solicitors' Remuneration Order, 1882, entitled to the scale fee mentioned in that rule in respect of the premium, even though no abstract of the lessor's title to the property has been furnished to the lessee. *In re* ROBSON - - - - 71

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26 & 27 Vict. c. 87 (*Savings Banks*), ss. 2, 3, 6, 10, 11 - - - - 537
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37 & 38 Vict. c. 42, s. 15, sub-s. 2—*Building Societies* - - - - 463
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TRADE-MARK — *Registration — Rectification of Register — "Person Aggrieved" — Expiration of Five Years since Registration—Part of Trade-mark in Common Use—Application to register Mark —Disclaimer—Patents, Designs, and Trade Marks Act*, 1883 (46 & 47 *Vict. c.* 57), *ss.* 64, 74, 76, 90—*Trade Marks Registration Act*, 1875 (38 & 39 *Vict. c.* 91), *ss.* 3, 5, 10.] The Plaintiffs in 1877 registered as a "new" trade-mark the device of a light-house on a rock, inclosed in two concentric circles. The two circles were in fact common to the trade in which the Plaintiffs were engaged. In 1888 the Plaintiffs registered a label, on which was printed (inter alia) their trade-mark. In their application for this registration they stated that they had used the label for upwards of ten years before August, 1875. This statement was in fact untrue, inasmuch as they had not used the trade-mark till 1877, and they had not used the rest of the label before 1870. In the opinion of the Court the misstatement was not made fraudulently, but through carelessness.—In 1888 the Plaintiffs brought an action against the Defendants (who were engaged in the same trade) for infringement of both the trade-mark and the label. The Defendants then moved to expunge both registrations: —*Held* (as to the trade-mark), that, by reason of the circles being in common use in the trade, the lighthouse with the circles ought never to have been registered, and that, therefore, the lapse of five years since the registration was not, under sect. 76 of the Trade Marks Act of 1883, a bar to the Defendants' application:—*Held*, also, that, by reason of the action for infringement, the Defendants, who were registered in one of the classes in which the Plaintiffs were registered, were as to that class "persons aggrieved" by the Plaintiffs' registration, and that the register must as to that class be rectified by adding a note, that so much of the Plaintiffs' mark as consisted of the device of two circles was common to the trade:—*Held* (as to the label), that the registration must be expunged, on the ground that it

TRADE-MARK—*continued.*
had been obtained by means of material misrepresentation.—The Defendants in 1877 registered as a trade-mark a device called a "winged cross." In practice they surrounded the mark with two concentric circles, like those which the Plaintiffs used; but they did not register the circles, because they were common to the trade. In 1888 the Defendants applied for the registration of the winged cross, surrounded by the circles, with a disclaimer of any exclusive right to the circles. The Plaintiffs opposed the registration, on the ground that the mark so nearly resembled their own as to be calculated to deceive:—*Held*, that the registration could not be allowed. Baker *v.* Rawson - - - - - 519
—— Infringement—Irish firm, service out of jurisdiction - - - - 78
See Practice. 7.

TRADE NAME—Sale of business—Goodwill
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TRUST—*Creditor's Deed—Resulting Trust.*] The partners in a business, by a deed reciting the inability of the firm to pay their creditors in full, assigned the business and the property of the firm to trustees upon trust, that they should at their discretion either carry on the business so long as they should think fit, or sell and dispose of the business and assets, and should by and out of the profits of the said business, if carried on, and out of the moneys to arise from the conversion of the property, pay the costs and expenses therein mentioned, "and do and shall pay and divide the clear residue of the said profits and moneys unto and among all and singular the creditors of the said firm in rateable proportions according to the amount of their several and respective debts, subject nevertheless to the covenants and provisions hereinafter contained." The deed gave the trustees power to pay in full or make arrangements with any creditors whose debts were under £30. The creditors, in consideration of the assignment, released the assignors from all claims in respect of the partnership. The assignors, after some years, sued the trustees for an account and to have a sale of the business set aside as improperly effected:—*Held* (reversing the decision of Kekewich, J.), that, although the deed contained no ultimate declaration of trust for the assignors in case the property was more than enough for payment of the debts, still, the object being the payment of debts, the transaction did not amount to a sale of the assets to the creditors, or an acceptance of the assets by them in accord and satisfaction; but there was a resulting trust of any surplus in favour of the assignors, who therefore could maintain a suit of this description. Cooke *v.* Smith - - - C. A. 38
—— Breach of—Contribution for—Priority of incumbrances on fraud - - 458
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—— Breach of—Statute of Limitations—Following assets - - - - 444
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TRUSTEE—*Trust—Administration—Overpayment to Beneficiary—Costs.*] A testator devised and bequeathed his residue to his wife and two sons, his executrix and executors, on trust for his wife

TRUSTEE—*continued.*

for life, and after her death as to one-fourth for each of his two sons, and as to the other two-fourths respectively on trust for each of his two daughters and their children. The widow and sons proved the will during the life of the widow. She managed the estate; she paid sums of money in respect of each fourth by anticipation, one son received more than was paid in respect of the other shares. It turned out after her death that the estate was insufficient to bring up the other shares to an equality with what such son had received:—*Held*, in an action to administer the testator's estate, that, it not being shewn that the deficiency had not arisen from subsequent wasting of the estate, neither son was liable as trustee to make good the deficiency of the other shares, and the son who had received the excess was not liable as beneficiary to refund; but that he could not be paid his separate costs as beneficiary because he had already received more in excess of his proper share than the amount of such costs. *In re* WINSLOW. FRERE *v.* WINSLOW - 249

—— Breach of trust—Following moneys - 1
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—— Charge of debts—Power to sell - 310
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VENDOR AND PURCHASER—*Specific Performance—Contract contained in Letters—Offer and Acceptance—Subsequent Correspondence.*] Though when a contract is contained in letters, the whole correspondence should be looked at, yet if once a definite offer has been made, and it has been accepted without qualification, and it appears that the letters of offer and acceptance contained all the terms agreed on between the parties, the complete contract thus arrived at cannot be affected by subsequent negotiation. — When once it is shewn that there is a complete contract, further negotiations between the parties cannot, without the consent of both, get rid of the contract already arrived at. — *Hussey* v. *Horne-Payne* (4 App. Cas. 311) and *Bristol, Cardiff, and Swansea Aërated Bread Company* v. *Maggs* (44 Ch. D. 616) discussed. BELLAMY *v.* DEBENHAM [481

—— Sale of business—Right to name - 577
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VOLUNTARY SETTLEMENT—*Annuity—Charge on Reversionary Interest in Stock—Contract or Assignment—Volunteer—Specific Performance—Equitable Charge—Insufficient Estate—Creditors—Priority.*] An annuity was granted by deed in consideration of love and affection to C., charged on certain hereditaments and upon the "moneys, securities for money, and other effects" of the grantor. At the date of the deed the grantor was entitled to a reversionary interest in stock standing in the name of trustees. The annuity was regularly paid for more than twenty years by the grantor, but on his death his personal estate proved insufficient to pay his debts, and the real estate was not enough to provide for the annuity:—*Held*, so far as the charge on the reversionary interest in the stock was concerned, that the deed depended only upon contract, and did not create a perfect and complete equitable charge in favour of C., and that as there could be no specific performance of a contract in favour of a volunteer, C. had no priority over the creditors of the grantor.—*Donaldson* v. *Donaldson* (Kay, 711) discussed. *In re* EARL OF LUCAN. HARDINGE *v.* COBDEN - - - - - 470

WAIVER—Irregularity of proceedings at meeting of shareholders - - - 330
See COMPANY. 2.

WILL—*Abatement—Legacies out of Proceeds of Sale—Deficiency—Failure of one Legacy—Residuary Legatee.*] Testatrix bequeathed her diamonds upon trust for sale, and thereout to pay two legacies of £600 and £700; the will contained a residuary bequest, but did not otherwise deal with the surplus (if any) of the proceeds of sale. The diamonds only realized £900; the legacy of £700 failed:—*Held*, that the £600 legacy was not liable to abate in favour of the residuary legatee, but was in effect a first charge on the proceeds of sale, which must be satisfied before the residuary legatee could take anything.—*Page* v. *Leapingwell* (18 Ves. 463) distinguished. *In re* TUNNO. RAIKES *v.* RAIKES - - - 66

2. —— *Annuity terminable on Expiration of Lease—Gift over on Death of A. without "leaving" Child.*] The principle of construction whereby, in the case of a gift over on death without "leaving" children, the word "leaving" is construed "having," so as not to take away an interest previously vested, will not readily be applied where the subject-matter of gift is an annuity, which ex vi termini involves the notion of personal enjoyment.—A testator gave to his daughter L. an annuity during her life payable out of the rents of leasehold property held for an unexpired term of about sixty years, and after the death of L. directed that the annuity should be payable half-yearly to and amongst such of her children as being sons should attain twenty-one, or being daughters should attain that age or marry, and if there should be but one such child, should be payable and paid to such only child, and in the event of the death of L. "without leaving" any such child the testator gave the annuity which should fail by such death unto and among the survivors of the testator's children and grandchildren. The testator directed that the leaseholds should not be sold, but be retained by his trustees, and the rents applied in payment of this and other annuities. L. survived the testator, and had one child who attained twenty-one, but died in the lifetime of L.:—*Held*, that the word "leaving" must be read in its literal sense, and that therefore the representative of the deceased child was not entitled to the annuity but the gift over took effect. *In re* HEMINGWAY. JAMES *v.* DAWSON - - 453

3. —— *Charge of Debts—Authority as distinct from Direction to Pay—Substitution by Vendors*

WILL—*continued.*

of a New Title.] A testator devised and bequeathed his real and personal estate to trustees upon trust to pay the rents of the real estate and the income of the personal estate to his wife for life, and after her death to sell and convert, and to divide the proceeds among his children. He then proceeded to "authorize" his trustees or trustee to "adjust and pay all claims made upon my estate, and generally to act in the premises as my said trustees or trustee shall in their or his discretion think fit." He appointed his trustees executors of his will:—*Held*, that this authority did not, like a direction to pay debts, make it the duty of the trustees to pay debts out of whatever property of the testator was vested in them, and did not charge the debts on the real estate, and that the trustees therefore had not during the life of the widow any power to sell the real estate.—The trustees, in December, 1889, entered into a contract to sell which was to be completed by the 24th of January, 1890. The purchaser took the objection, that during the life of the widow the trustees could not sell. On the 6th of January the vendors' solicitor wrote contending that the trust for sale could be accelerated by a surrender of the life estate. On the following day the purchaser's solicitor wrote repudiating the contract, and asking for a return of the deposit. Nothing more took place till the 29th of January, when the vendors' solicitor wrote to say that a good title could be made by the concurrence of the beneficiaries which the vendors would procure:—*Held*, that the purchaser was entitled to be relieved from his contract, the concurrence of the beneficiaries not being offered till after the time for completion had expired, and long after the repudiation by the purchaser.—Whether, if the vendors had at once, when this objection to the title was taken, offered the concurrence of the beneficiaries, shewn that they could and would concur, and given an opportunity of investigating their title, they might not have forced the purchaser to take the title, *quære*. *In re* Head's Trustees and Macdonald - 310

4. —— *Forfeiture Clause—Interfering with Management—Frivolous Action against Trustees.*] A testator gave his freehold estate at R. to two trustees in trust to pay certain annuities to the Plaintiff during his life, and after his death for the Plaintiff's unborn sons in fee; provided always that if the Plaintiff should in any way intermeddle or interfere with or attempt to meddle or interfere with the management of the testator's real or personal estate, the said annuities should immediately cease. And the testator gave the residue of his real and personal estate to his daughter E. A., who was one of the trustees. E. A. entered into possession of the estate at R., and paid the annuities regularly to the Plaintiff; but the Plaintiff brought an action against the two trustees, alleging that his annuities had not been paid, that E. A. had wasted the estate, and that the buildings were out of repair, and claiming an account, an injunction, and receiver. The Court held on the evidence that none of the charges against the trustees were established:—*Held*, that the action was groundless and frivolous, and was an attempt to interfere with the management of the estate, and that the Plaintiff by bringing the action had forfeited his annuities. Adams *v.* Adams - - - - 426

WILL—*continued.*

5. —— *Gift of Income to Wife—Absolute Interest—Life Estate—Gift over—Death "without leaving Children"—Implied Gift to Children—Residuary Gift.*] Where, in a will, there is a gift to A. for life, with a gift over "on the death of A. without leaving children," those words are not, by themselves, without assistance from other parts of the will, sufficient to create a gift by implication to the children.—A testator gave his real and residuary personal estate to his wife and his nephews S. and W. upon trust for his wife during her life; and after her death he gave his real estate to his brother during his life, with remainder, as to three freehold houses, to his (the testator's) nephews S. and W., upon trust to pay the rents and interest to his niece during her life for her separate use; and after the decease of his said niece, "she leaving no child or children," the testator gave one of the three freehold houses to his nephew S., and the other two to his nephew W. And after bequeathing certain legacies, which he directed should be paid out of any residue there might be left, or, if none, then out of the rents of the real estate, the testator gave the residue of his real and personal estate to his nephews S. and W. equally. The testator's niece survived his wife and brother, and died leaving two children:—*Held*, by Kay, J., that the niece took an absolute interest in fee simple in the three houses; but *held*, on appeal, that she took a life interest only; and that, on her death, the houses passed under the ultimate residuary gift to the two nephews equally, there being no implied gift to the children of the niece.—The rules of construction laid down in *Kinsella* v. *Caffrey* (11 Ir. Ch. Rep. 154, 162), as to implied gifts to children, approved of. *In re* Rawlins' Trusts [299

6. —— *Trust for Investment—Railway or other Public Companies—Things ejusdem generis.*] A testator directed his trustees to invest the residue of his estate (inter alia) "upon the debentures or securities of any railway or other public company carrying on business in any part of the United Kingdom." The trustees proposed to invest in the securities of certain companies incorporated under the Companies Acts:—*Held*, that the companies having been incorporated by public statute, the instruments forming their constitution being accessible to the public, and their shares being transferable to the public, they were public companies within the investment clause; and that the reference to railway companies in the same clause did not restrict the meaning of the words "public companies."—The decision of Stirling, J., affirmed. *In re* Sharp. Rickett *v.* Sharp 286

7. —— *Republication—Will of Married Woman in exercise of Power—Testamentary Instrument after Husband's Death—Absence of Reference to prior Will.*] A married woman having a power of appointment made a will whereby she appointed the property subject to the power and all other, if any, property over which she had any power of disposition.—After her husband's death, she signed, in the presence of two witnesses, a

WILL—*continued.*
paper which contained no reference to her will, but merely stated that certain specific property was a present to X. Y., and after her death this paper was admitted to probate together with her will:—*Held*, that this subsequent testamentary instrument did not constitute a republication of the will, and that the testatrix was intestate as to her property (not being separate property or within the power) other than that portion of it specifically mentioned in the instrument.—*Rowley* v. *Eyton* (2 Mer. 128) explained. *In re* Smith. Bilke *v.* Roper - - - - 632
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